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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1991

THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS ANCILLARY RECEIVER OF TRANSIT CASUALTY COMPANY,

Petitioner,

v.

ALAN DIGIROL,

Respondent.

On Petition For A Writ Of
Certiorari To The Court of
Appeals Of The State Of New York

PETITION FOR A WRIT OF CERTIORARI

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83

QUESTION PRESENTED

Where a Missouri state court, having unquestioned jurisdiction over a Missouri insurance company, issues an order which directs the liquidation of that Missouri insurance company and, concomitantly, unconditionally cancels all of that insurance company's policies as of a date certain, can a New York State court, without violating the Full Faith and Credit mandate of the United States Constitution (Article 4, Section 1), determine that a policy issued by that insurance company had not been effectively canceled by the Order of Liquidation because of the failure to give notice of cancellation pursuant to a provision in the policy?

TABLE OF CONTENTS

Pages

Question Presented i

Contents of Appendices iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional And Statutory Provisions Involved 3

Statement of the Case 4

1. Introduction 4

2. The Claims and Proceedings Below 6

Reasons for Granting the Writ 15

1. The New York Court's Violation of the Full Faith and Credit Clause Was Timely Raised And Is Properly Before This Court 15

2. The Missouri Circuit Court Had Jurisdiction To Issue The Order Of Liquidation And Its Concomitant Cancellation Of Policies. That Order Is Entitled To Full Faith And Credit 18

3. The Order Sought To Be Reviewed Sets A Dangerous Precedent And Can Have Unforeseen Consequences 27

Conclusion 28

CONTENTS OF APPENDICES

Pages

APPENDIX A—*Matter of Transit Casualty Co., Digirol v. Superintendent of Ins.*, 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140 (1992).....1a

APPENDIX B—*Matter of Transit Casualty Co., Digirol v. Superintendent of Ins.*, 169 A.D. 2d 564, 564 N.Y.S.2d 418 (1st Dep't 1991).....16a

APPENDIX C—*Matter of Transit Casualty Co. (Digirol)* No. 43846/85, Claim No. W-507549 (N.Y. Sup. Ct., May 21, 1990).....19a

APPENDIX D—Referee's Interim Report, *Matter of Transit Casualty Co. (Digirol),* No. 43846/85, Claim No. 507549 (November 2, 1989).....24a

APPENDIX E—Order Denying Leave to Appeal and Dismissal of Appeal, *Matter of Transit Casualty Co., Digirol v. Superintendent of Ins.*, 77 N.Y.2d 950, 573 N.E.2d 573, 570 N.Y.2d 485 (1991).....41a

APPENDIX F—Order Denying Rehearing and Reargument, *Matter of Transit Casualty Co., Digirol v. Superintendent of Ins.*, 79 N.Y.2d 996 (1992).....42a

APPENDIX G—Amended Order of Liquidation, *Hall v. Transit Casualty Co.*, No. CV185-1206CC (Cir. Ct., Cole Co., Mo., December 4, 1985).....43a

TABLE OF AUTHORITIES

Cases *Pages*

Ballesteros v. New Jersey Property Liability Insurance Guaranty Association, 530 F. Supp. 1367 (D.N.J.), *aff'd,* 696 F.2d 980 (3d Cir. 1982)..... 26

Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930)..... 16

Canada Southern Railroad Co. v. Gebhard, 109 U.S. 527 (1883)..... 22

Carr v. Hamilton, 129 U.S. 252 (1889).....24,25

Carr v. Union Mut. Fire Ins. Co., 28 Mo. App. 215 (1887).....8,14,23,26

Casteel v. Kentucky Home Life Ins. Co., 258 Ky. 304, 79 S.W.2d 941 (1935)..... 25

Chicago Life Ins. Co. v. Needles, 113 U.S. 574 (1885)...21

Chicago Title and Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp., 302 U.S. 120 (1937)..... 21

Clay v. Independence Mut. Ins. Co., 359 S.W.2d 679 (Mo. 1962)..... 25

Commissioner of Ins. v. Massachusetts Acc. Co., 314 Mass. 558, 50 N.E.2d 801 (1943)..... 25

Commonwealth v. Massachusetts Mut. Fire Ins. Co., 119 Mass. 45 (1875)..... 25

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). 2

Crist, as Receiver for Transit Cas. Co. v. Benton Casing Service, 572 So.2d 99 (La. App. 1990), *cert. den.*, 573 So.2d 1143 (La. 1991)..... 25

Dean & Son's Appeal, 98 Pa. St. 101 (1881)..... 26

Doane v. Millville Mut. Marine & Fire Ins. Co., 43 N.J. Eq. 522, 11 A. 739 (1887), *revd. on oth. grds.*, 45 N.J. Eq. 274, 17 A. 625 (E. & A. 1889)..... 26

Fiore v. Oakwood Plaza Shopping Center, Inc., 78 N.Y.2d 572, 585 N.E.2d 364, 578 N.Y.S.2d 115 (1991)..... 19

Fuller v. Wright, 147 Ga. 70, 92 S.E. 873 (1917)..... 25

Gehr v. Board of Education of the City of Yonkers, 304 N.Y. 436, 108 N.E.2d 371 (1952)..... 2

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932)..... 16,17-18

Hall v. Transit Casualty Co., No. CV185-1206CC (Cir. Ct., Cole Co., Mo., December 4, 1985)..... 2

Hartford Life Insurance Co. v. Ibs, 237 U.S. 662 (1915)..... 26

Herndon v. Georgia, 295 U.S. 441 (1935)..... 16

Hobbs v. Occidental Life Ins. Co., 87 F.2d 380 (10th Cir. 1937), *cert. den. sub nom Beck v. Occidental Life Ins. Co.*, 305 U.S. 603 (1938)..... 25

Kuhl v. General American Life Ins. Co., 56 Ga. App. 424, 192 S.E. 831 (1937)..... 25

Lac d'Amiante du Quebec, Ltee. v. American Home Assur. Co., 864 F.2d 1033 (3d Cir. 1988)..... 26

Larson v. Pacific Mutual Life Ins. Co. of California, 373 Ill. 614, 27 N.E.2d 458, *cert. den.*, 311 U.S. 698 (1940)..... 26

Martyne v. American Union Fire Insurance Co., 216 N.Y. 183, 110 N.E. 502 (1915)..... 22

Matter of Empire State Surety Co., 214 N.Y. 553, 108 N.E. 825 (1915)..... 17

Matter of Equitable Reserve Fund Life Assoc. of the City of N.Y., 131 N.Y. 354, 30 N.E. 114 (1892)..... 17

Matter of Farmland Dairies v. Barber, 65 N.Y.2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 (1985)..... 19

Matter of Knickerbocker Agency Inc. (Holz), 4 A.D.2d 71, 162 N.Y.S.2d 822 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 245, 149 N.E.2d 885, 173 N.Y.S.2d 602 (1958)..... 23

Matter of Transit Casualty Company, Digirol v. Superintendent of Ins., 79 N.Y.2d 996 (1992)..... 1

Matter of Transit Casualty Company, Digirol v. Superintendent of Ins., 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140 (1992)..... 1

Matter of Transit Casualty Co., Digirol v. Superintendent of Ins., 77 N.Y.2d 950, 573 N.E.2d 573, 570 N.Y.2d 485 (1991)..... 1

Matter of Transit Casualty Co., Digirol v. Superintendent of Ins., 169 A.D.2d 564, 564 N.Y.S.2d 418 (1st Dept. 1991)..... 1

Milliken v. Meyer, 311 U.S. 457 (1940).....14,19

Moody v. Texas, 520 S.W.2d 452 (Tex. App. 1975).....20

Morris v. Jones, 329 U.S. 545 (1947).....20

Mumma v. Potomac Co., 33 U.S. 281 (1834).....22

Neblett v. Carpenter, 305 U.S. 297 (1938).....26,28

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)..... 16

North River Ins. Co. v. Walker, 65 F.2d 116 (8th Cir. 1933)..... 25

O'Malley v. Wilson, 182 Ga. 97, 185 S.E. 109 (1936).. 20

Old Wayne Mutual Life Association of Indianapolis, Indiana v. McDonough, 204 U.S. 8 (1907).....13,17

Padway v. Pacific Mutual Life Insurance Co., 42 F. Supp. 569 (E.D. Wis. 1942)..... 26

People v. American Loan & Trust Co., 172 N.Y. 371, 65 N.E. 200 (1902).....9,25

People v. Commercial Alliance Life Ins. Co., 154 N.Y. 95, 47 N.E. 968 (1897)..... 8,17,23

People v. Metropolitan Surety Co., 205 N.Y. 135, 98 N.E. 412 (1912)..... 24

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)..... 16

Reliance Lumber Co. v. Brown, 4 Ind. App. 92, 30 N.E. 625 (1892)..... 25

Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. den.,* 434 U.S. 1068 (1978).. 26

Smith v. National Credit Ins. Co., 65 Minn. 283, 68 N.W. 28 (1896)..... 25

Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66 (1938)..... 26

State ex rel. Schaefer v. Minnesota Title Ins. & Trust Co., 104 Minn. 447, 116 N.W. 944 (1908)..... 25

Superintendent of Ins. of the State of N.Y. v. Hostetler, 668 F. Supp. 1057 (N.D. Ohio 1986), *aff'd,* 826 F.2d 1065 (6th Cir. 1987)..... 20

Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 48 N.W. 772 (1891)..... 25

Taylor v. Pacific Mutual Life Ins. Co., 214 N.C. 770, 200 S.E. 882 (1938)..... 25

Thomas v. Land, 225 Mo. App. 216, 30 S.W.2d 1035 (1930).....9,14,23

Todd v. German-American Ins. Co. of N.Y., 2 Ga. App. 789, 59 S.E. 94 (1907)..... 25

Wolfe v. North Carolina, 364 U.S. 177 (1960).....18

Statutes and Other Authorities

Fire Insurance: Insolvency of, or Appointment of Receivership for, Insurer as Affecting Subsequent Losses, 79 A.L.R. 1267 .....,..23

N.Y. Civil Practice Law and Rules §4201 2

N.Y. Civil Practice Law and Rules §4211 2

N.Y. Civil Practice Law and Rules §4212 2

N.Y. Civil Practice Law and Rules §4320(b) 2

N.Y. Civil Practice Law and Rules §5601(b)(1).....10

N.Y. Insurance Law §7410 5

28 U.S.C. §1257 3

28 U.S.C. §1738 3

United States Constitution, Article IV, §1 .....i,3

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OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix A, pp. 1a-15a, *infra*) is reported at 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140 (1992) under the title *In the Matter of Transit Casualty Company. Alan Digirol, Appellant; Superintendent of Insurance, as Ancillary Receiver of Transit Casualty Company, Respondent.* The opinion of the Appellate Division of the First Judicial Department reversed by the Court of Appeals is reported at 169 A.D.2d 564, 564 N.Y.S.2d 418 (1991) (Appendix B, pp.17a-18a, *infra*). The Order and opinion of the *nisi prius* court (Appendix C, pp. 22a-23a, *infra*) are unreported, as is the report and recommendation to that court by the Referee appointed to hear and report (Appendix D, pp.

24a-40a *infra*).[1] Other decisions in this matter are the denial, by the New York Court of Appeals, of both Mr. Digirol's (protective) motion for leave to appeal to that Court and the Superintendent's cross-motion to dismiss the appeal taken as of right (Appendix E, p. 41a, *infra*), reported at 77 N.Y.2d 950, 573 N.E.2d 573, 570 N.Y.S.2d 485 (1991), and the Order of the same court denying the Superintendent's motion for rehearing and reargument of the appeal (Appendix F, p. 42a, *infra*), reported at 79 N.Y.2d 996 (1992). Also of import to the issues presented is the (unreported) Amended Order Of Liquidation And Appointment Of Permanent Receiver, issued by the Circuit Court of Cole County, Missouri in the action entitled *Hall v. Transit Casualty Company* (Appendix G, pp. 43a-45a, *infra*).

JURISDICTION

The Order of the New York Court of Appeals which reversed the Order of the Appellate Division and granted Mr. Digirol's cross-motion to confirm the Referee's report, was issued on January 14, 1992. That Order is final, notwithstanding hearings scheduled before the Referee to determine the amount of damages, in that the federal issue therein has been finally decided by the highest court of the State and that determination will survive regardless of the outcome of any future state court proceedings. *See, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-480 (1975). A timely motion was instituted for rehearing and reargument, which motion was denied on

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1. Under New York law, the findings and conclusions contained in the report of a Referee assigned to hear and report are in no way binding, but are purely advisory in purpose. *Gehr v. Board of Education of the City of Yonkers*, 304 N.Y. 436, 108 N.E.2d 371 (1952); see N.Y. Civil Practice Law and Rules §§ 4201, 4211, 4212, 4320(b).

April 30, 1992 (Appendix F, p. 42a). The jurisdiction of this Court rests upon 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV, §1:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. §1738:

> State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full

faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

1. Introduction

Claimant Alan Digirol, owner of the Alton Hotel in Sodus, New York, obtained a multi-peril policy of insurance from Transit Casualty Company, providing, *inter alia*, coverage for damages caused to the hotel by fire, and having a policy period of February 29, 1984 to February 29 [sic], 1987. Among its conditions was one which provided:

> This policy may be canceled by the Company by mailing to the named insured at the mailing address shown in the Declarations, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period.

By a subsequent amendatory endorsement, this condition of the policy was changed as follows:

> The provision of the policy requiring ten (10) days' notice of cancellation by the Company is amended to forty-five (45) days.

Transit Casualty Company was a Missouri corporation having its principal place of business in California. By Order dated December 3, 1985, and (for all intents and

purposes, an identical) Amended Order, dated December 4, 1985, the Circuit Court of Cole County, Missouri, declared Transit to be insolvent. The Order appointed a permanent Receiver, who was directed to take possession of the property, books, records and accounts of the company for the purpose of effectuating the winding up and liquidation of Transit. Among its other provisions, the Order provided:

> All policies of insurance issued by defendant Transit Casualty Company canceled effective at midnight on December 20, 1985.

The Order was duly filed with the Clerk of the Circuit Court of Cole County. Appendix G, pp. 43a-45a.

The Order contained no provision for notifying Transit's insureds concerning the liquidation. Nevertheless, the Receiver undertook the task of doing so. The Order was published in the New York Law Journal on December 6 and December 10, 1985. Similar notices were placed in other "legal notice" publications around the country. The Receiver also undertook to mail copies of the Order to each of the approximately 100,000 insureds of Transit. A copy of the Order *was* mailed on or about December 13, 1985, to the Alton Hotel on Old Ridge Road, Sodus, New York, the address listed on the declarations page of the policy, although an amendment in the body of the policy designated a new mailing address. Unfortunately, although claimant testified that he received mail sent to the original address despite the change, the Receiver's mailing was returned by the post office marked "Return to Sender." The Receiver took no other efforts to notify the insured.

In accordance with the Uniform Insurers' Liquidation Act (see N.Y. Insurance Law §7410), an Order was

issued by the Supreme Court, New York County, on December 26, 1985, appointing the petitioner herein, the Superintendent of Insurance of the State of New York, as Ancillary Receiver of Transit Casualty Company.

2. The Claims and Proceedings Below

On February 16, 1986, the Alton Hotel was destroyed by fire. Claimant timely filed a proof of claim with the Receiver of Transit Casualty Company in Missouri and, subsequently, with the Superintendent in New York as Ancillary Receiver. The claims were rejected by the Receiver and the Ancillary Receiver, on the ground that all policies issued by Transit had been canceled on December 20, 1985 pursuant to the Liquidation Order. Inasmuch as the fire occurred after that date, the resulting damages were not covered. Claimant objected to the disallowance of the claim. The contest came to be presented before a Referee appointed to hear and report to the Court supervising the ancillary receivership in New York.

From the outset of the ensuing hearings, the Superintendent's position was clearly stated:

> The Missouri Order flatly says all policies of insurance issued by the defendant, Transit Casualty Company, cancelled, effective at midnight, December 20th, 1985. That's the Missouri Order. It's our position that the New York Court cannot change, modify, or alter the Missouri Order. There is no indication there that notice has to be given or anything else. This is a policy issued by Transit Casualty in either Missouri or California .... New York insurance law doesn't apply here at all. Misouri law applies here .... [T]he Liquidation Order supercedes the language in the insurance law because the policies are cancelled pursuant to the Order.

Transcript of Hearing before Referee Benedict Ginsberg, April 17, 1989, Record on Appeal before the New York Court of Appeals, pp. 114-115. In response, claimant argued that the failure to provide notice of cancellation in accordance with the policy's terms rendered the cancellation ineffective.

After hearing testimony and reviewing documents, the Referee issued an Interim Report. Among other things, the Referee found that "notice of cancellation was neither timely given nor correctly addressed, and that it was never received." Appendix D, p. 31a. The Referee concluded that "if notice of the court's order was a precondition to cancellation of the policy, I conclude that the policy was not canceled because notice was not given." *Id.* at p. 34a. The Referee then determined that the policy requirement of notice for cancellation was applicable notwithstanding the Missouri Court Order, stating:

> Liquidation in New York, and in Missouri, where Transit was put in liquidation, occurs on the application of the Superintendent of Insurance. The claimant here does not contend that he was entitled to be heard on whether or not Transit was insolvent, and should be liquidated. He contends he was entitled to notice prior to the cancellation of his insurance to allow him time to get a policy elsewhere, and avoid interruption in coverage. I think he is right.

Appendix D, p. 39a.

On the Superintendent's motion to disaffirm the Referee's report, and on the cross-motion instituted by claimant to confirm the report, the *nisi prius* Justice held in favor of the Superintendent. While confirming the factual findings of the Referee, the Court held:

> It appears to be the rule of law that the policy of insurance was canceled, before the fire, as the result of the order of cancellation [sic] by the Circuit Court. No claim is made that the Circuit Court did not have jurisdiction over the case. The policy was issued by this Missouri insurer, and was therefore subject to the laws of Missouri. *Carr v. Union Mutual Fire Ins. Co.*, 28 Mo. App. 215, appears to state the law in Missouri. New York law appears, for similar reasons, to be the same. *Peo[ple] v. [Commercial Alliance Life Insurance Co.]*, 154 N.Y. 95.

Appendix C, p. 23a.

Mr. Digirol filed an appeal to the Appellate Division of the Supreme Court of the State of New York, in the First Judicial District. Claimant's point of argument in his brief to that court was:

> Supreme Court's decision, in holding that notice to Digirol was not a precondition to the effective cancellation of its policy, ignores contemporary principles of procedural due process and amounts to a "taking of property" and interference with his liberty interests without due process in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Brief of Claimant-Appellant Alan Digirol to the Appellate Division, p. 8. The Superintendent argued, *inter alia*, that:

> The Missouri Court's Order of Liquidation terminated claimant's policy as a matter of law. The Receiver was under no obligation, either statutory or contractual, to give notice of cancellation to claimant in order to make the cancellation effective.

Brief of Respondent Superintendent of Insurance to the Appellate Division, pp. 13, 28. In the course of so arguing, the Superintendent urged (as he had in memoranda to the *nisi prius* Justice):

> It is thus the domiciliary Liquidation Court, having the absolute right of control over the "contracts ... located in this state", which has the right to terminate those contracts, just as New York concededly has the right to terminate the contracts of its domiciled insurers upon liquidation (Insurance Law §7405[b]). New York's courts are bound to give full faith and credit to the Liquidation Orders of reciprocal states in order to further the purpose and intent of the Uniform Insurers Liquidation Act [citation omitted].

Id. at 22.

The Appellate Division unanimously affirmed the *nisi prius* court, stating:

> Both under New York law and under Missouri law, an insured has no further rights against the insurer as of the date the insurer is placed in liquidation (*People v. American Loan and Trust Co.*, 172 NY 371; *Thomas v. Land*, 225 Mo. App. 216, 30 SW2d 1035). In light of this rule of law, which the claimant concedes, the claimant cannot be said to have had a due process right to the insurance policy after the date of liquidation. Just as there is no due process right prior to the date that right is created by law (*Jewish Memorial Hospital v. Whalen*, 47 NY2d 331, 340), there is no due process right after it has been extinguished automatically by operation of law.

Appendix B, p. 18a.

Mr. Digirol appealed that Order to the New York Court of Appeals as of right pursuant to N.Y. Civil Practice Law and Rules §5601(b)(1), i.e., upon the ground that the Order of the Appellate Division "finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." *Id.* A motion made by the Superintendent to dismiss the appeal upon the ground that no substantial constitutional question was involved was denied. Appendix E, p. 41a. Mr. Digirol's principal point in argument was:

> The Appellate Division inexcusably ignored Digirol's right to due process protection for his Transit fire policy which provided for cancellation only upon notice to the insured.

Brief of Claimant-Appellant Alan Digirol to the New York Court of Appeals, p. 8. In response, the Superintendent argued:

> The Missouri Court's Orders of Liquidation terminated claimant's policy as a matter of law. The Receiver was under no obligation, either statutory or contractual, to give notice of cancellation to claimant in order to make the cancellation effective....Claimant has no constitutionally protected "property right" in the provisions of a policy that was extinguished automatically by operation of law .... The Receiver's efforts to give notice here were, in any event, more than sufficient.

Brief of Respondent Superintendent of Insurance to New York Court of Appeals, pp. 14, 35, 41. In support of that argument, the Superintendent again urged that full faith and credit be given to the Missouri Order of Liquidation to further the purpose and intent of the Uniform Insurers'

Liquidation Act. *Id.* at 28.

In a four-to-three Decision and Order dated January 14, 1992, the New York Court of Appeals reversed the Appellate Division's determination. Notwithstanding that the appeal focused upon a claimed due process violation, the Court purported to make its decision "without reaching the constitutional issue." Rather it found meritorious a non-constitutional *contract* claim purportedly made by Mr. Digirol:

> ... that the order of the Missouri court did not extinguish vested rights and that he had a vested right to prior notice of any cancellation before the policy could be effectively terminated, which he did not receive.

Appendix A, p. 2a. The Court went on to hold that Mr. Digirol had a distinct, vested *contractual right* to notice of cancellation, and that the failure of the Receiver to provide such notice in accordance with the policy rendered cancellation ineffective:

> In the case now before us the claimant's fire insurance policy was subject to cancellation during its term, but only if prior written notice of the cancellation was mailed to the insured. This created a distinct contractual right, which must also be recognized as a valuable property right deserving of protections [citation omitted], in addition to the primary insurance protection. The right to notice of cancellation gave the policyholder the additional assurance that if coverage was discontinued, he would be informed of the fact that his property was again at risk so that he could obtain another policy to insure against the risk. The requirement that the notice precede the cancellation enhanced this right by assuring the policyholder that the opportunity to obtain coverage from another

> company would be available before there was a lapse in coverage. At the time of liquidation in this case that right matured and what remained to be done was for the company, or its successor, to perform the contractual obligation by informing the insured of the impending cancellation. That obligation to give notice of cancellation could not be satisfied by publication, or mailing notice to the wrong address, when the correct current address was included in the policy [citations omitted].

Apendix A, pp. 5a-6a.

The Superintendent timely moved the Court for rehearing and reargument and to amend its remittitur. His principal argument in support of that motion was that the Court of Appeals, aside from making a profound and manifest change in New York law governing liquidation of insurance companies, had violated the constitutional mandate to give Full Faith and Credit to the Missouri Order of Liquidation:

> Notwithstanding that claimant's sole argument to this Court was premised upon a purported violation of his constitutional rights to due process by reason of cancellation of his policy without notice pursuant to the contract terms, this Court purported to render its determination solely upon application of contract law. We respectfully submit that in attempting to avoid the determination of one constitutional issue, the Court necessarily passed upon another; in refusing to enforce the Missouri Order of Liquidation without finding it violative of a constitutional principle, this Court failed to give full faith and credit to that Order as mandated by Article 4, Section 1 of the United States Constitution.

As recognized by this Court (Slip Op., p. 3), the Amended Order of the Circuit Court of Cole County, Missouri, the state in which Transit had been incorporated, provided: "All policies of insurance issued by defendant Transit Casualty Company canceled effective at midnight on December 20, 1985" (R220). This directive is clear and unambiguous; there are no "ifs, ands or buts"; there are no qualifications.

Article 4, Section 1 of the United States Constitution states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

The Order of the Circuit Court of Missouri was, therefore, to be enforced by the courts of this State without regard to whether it complies with this State's notions of contract law....

It is one thing if, as argued by claimant, the Order of the Missouri Court had violated claimant's rights to due process of law. It is established doctrine that the full faith and credit mandate is inapplicable to an order violative of constitutional due process rights (see, e.g., *Old Wayne Mutual Life Association of Indianapolis, Indiana v. McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 [1907]). [Footnote omitted.]

This Court, however, eschewed a determination of constitutional violation. It refused to enforce the Missouri Circuit Court Order of Liquidation solely upon the ground that, as a matter of contract law, claimant was entitled to notice provided for in the insurance policy prior to its termination. Yet, the law in this regard is clear:

> "[I]f the judgment on its fact appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.' In such case the Full Faith and Credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. Whatever mistakes of law may underlie the judgment it is 'conclusive as to all the media concludendi' [citations omitted]" (*Milliken v. Meyer*, 311 U.S. 457, 462, 61 S. Ct. 339, 85 L.Ed. 278, 282-283 [1940]).
>
> It is categorically clear that Missouri Courts would enforce the provision of a liquidation order cancelling all policies, whether or not the insured received notice pursuant to the terms of the policy. That is established law in Missouri (*Thomas v. Land*, 225 Mo. App. 216, 30 S.W.2d 1035 [1930]; *Carr v. Union Mutual Fire Insurance Co.*, 28 Mo. App. 215 [1887]).

Memorandum of Law on Behalf of [Superintendent] in Support of Motion for Rehearing and Reargument or, in the Alternative, to Amend the Remittitur, pp. 5-8.

In opposition, Mr. Digirol argued:

> The [Superintendent] was fully aware in not raising the argument of the Full Faith and Credit clause that the Misouri court did not have jurisdiction of the policyholder Digirol when it made its Amended Order cancelling the policy without prior notice.... Before an order of a sister state is entitled to full faith and credit, the sister state must have jurisdiction over the party whose rights are about to be af-

> fected. As the majority of the court noted (slip op. 2) the 'Claimant was not a party to the liquidation proceedings...'

Affirmation in Opposition, p. 2. The New York Court of Appeals denied the motion without opinion. Appendix F, p. 42a.

REASONS FOR GRANTING THE WRIT

NEW YORK'S FAILURE TO AFFORD FULL FAITH AND CREDIT TO THE MISSOURI ORDER OF LIQUIDATION, AN ISSUE TIMELY RAISED AND PROPERLY PRESENTED TO THIS COURT, RAISES GRAVE DOUBTS CONCERNING THE POWER OF A STATE TO EFFECTIVELY LIQUIDATE AN INSURANCE COMPANY WITHIN ITS JURISDICTION. NO CLAIM OF DUE PROCESS INTERDICTS APPLICATION OF THE FULL FAITH AND CREDIT CLAUSE HERE.

1. The New York Court's Violation Of The Full Faith And Credit Clause Was Timely Raised And Is Properly Before This Court.

In opposition to the Superintendent's motion for rehearing and reargument or to amend the remittitur, Mr. Digirol implied that the issue of compliance with the Full Faith and Credit mandate had not been raised to the State Courts. If that argument is raised in opposition to this petition, we submit that the assertion should be rejected.

First, we note that the mandate to accept and enforce the Missouri Order of Liquidation, and specifically its directive cancelling all Transit policies on a date certain, was raised from the outset (see p. 6, *supra*). Furthermore, the Superintendent argued at every stage of the litigation the need to give Full Faith and Credit to the Missouri

Order of Liquidation. This Court has often noted that there is no magic formula for raising a Federal issue in a state court:

> No particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980), quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). We submit that this standard was met here.

Yet, even if we are to look solely to the motion for rehearing and reargument, it is submitted that the State Court's violation of the Full Faith and Credit clause, the fulcrum of that motion, was timely raised therein. It is a well-recognized exception to the rule mandating that a constitutional question be raised prior to a motion for rehearing, where:

> ... the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right.

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932); *Accord, Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 677-678 (1930); *See, Herndon v. Georgia*, 295 U.S. 441, 444 (1935).

Those are clearly the circumstances in this case. In ruling that an Order of Liquidation and its concomitant cancellation of policies was ineffective without notice to

the policyholder pursuant to the terms of the insurance policy, the Court of Appeals was overturning long-established law in New York. *See, Matter of empire State Surety Co.*, 214 N.Y. 553, 568-569, 108 N.E. 825 (1915); *People v. Commercial Alliance Life Ins. Co.*, 154 N.Y. 95, 47 N.E. 968 (1897); *Matter of Equitable Reserve Fund Life Assoc. of the City of N.Y.*, 131 N.Y. 354, 378-379, 30 N.E. 114 (1892). That was the principle relied upon by the Appellate Division and the *nisi prius* court. Indeed, the holding of the Court below runs contrary to the established law throughout the jurisdictions of this country. See Subpoint 2, *infra*. That this turn of events was "new and unexpected" is an understatement.

The "new and unexpected" development is especially apparent from the fact that claimant's constitutional due process issues effectively blunted the opportunity for the Superintendent to press the Full Faith and Credit point before the New York Court of Appeals. Mr. Digirol was asserting, on his appeal taken as of right on constitutional grounds, that the Missouri Order's cancellation of his policy without notice deprived him of a property interest without due process of law. The Full Faith and Credit mandate was thereby rendered inapplicable. *See, e.g., Old Wayne Mutual Life Association of Indianapolis, Indiana v. McDonough*, 204 U.S. 8 (1907). Since Mr. Digirol's brief was asserting the due process violation, the Superintendent's responsive brief had to argue that no such violation occurred. However, the New York Court of Appeals purported to ignore the constitutional issues and determined the case upon the purported violation by Missouri of Mr. Digirol's *contractual* rights. This was truly "new and unexpected."

Under the circumstances, we submit that the violation of the Full Faith and Credit clause was timely raised and is properly before the Court for consideration. *See, Great*

Northern Railway Co. v. Sunburst Oil and Refining Co., *supra*, 287 U.S. at 367.[2]

2. **The Missouri Circuit Court Had Jurisdiction To Issue The Order Of Liquidation And Its Concomitant Cancellation Of Policies. That Order Is Entitled To Full Faith And Credit.**

The directive contained in the Missouri Order of Liquidation is clear and unequivocal:

> All policies of insurance issued by defendant Transit Casualty Company cancelled effective at midnight on December 20, 1985.

Appendix G, p. 45a. There is no provision in the Order for notice to the insureds pursuant to the policy provisions. Indeed, no such notice *could* have been given. The Order and Amended Order of Liquidation were issued on December 3 and 4, 1985, respectively, and directed cancellation as of December 20. The policy issued to Mr. Digirol, as endorsed, required *45-days' notice* for the company to effect cancellation. The issue is thus starkly presented: the Order unmistakably effects cancellation in contravention of the policy notice provisions. Providing Full Faith and Credit to the Missouri Order necessarily required the New York Court to disregard the policy cancellation condition.

The effects and limitations upon the application of

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2. That the Court of Appeals declined to amend its remittitur does not prevent review of the Constitutional issue by this Court. It is this Court, not the state court, which will determine whether the effect of the state court's Order was in violation of the United States Constitution, notwithstanding the state court's effort to avoid constitutional issues. *See, Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960).

the Full Faith and credit mandate have been clearly identified:

> [I]f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.' In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. Whatever mistakes of law may underlie the judgment it is 'conclusive as to all the media concludendi' [citations omitted].

Milliken v. Meyer, 311 U.S. 457, 462 (1940). Indeed, the New York Court of Appeals has itself, in other contexts, recognized the effects of the Full Faith and Credit doctrine on the extent of review available to a sister state's Order:

> As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations. Thus, inquiry into the merits of the underlying dispute is foreclosed; the facts have bearing only in the limited context of our jurisdictional review [citations omitted].

Fiore v. Oakwood Plaza Shopping Center, Inc., 78 N.Y.2d 572, 577, 585 N.E.2d 364, 578 N.Y.S.2d 115 (1991); *Accord, Matter of Farmland Dairies v. Barber*, 65 N.Y.2d 51, 55, 478 N.E.2d 1314, 489 N.Y.S.2d 713, 716 (1985). Thus, it is irrelevant to the full faith and credit inquiry that a New York Court might choose to change its state's long-established rule that an Order liquidating an insurance company terminates its policies, see *infra*. As this Court has noted:

> The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ. Its need might not be so greatly felt in situations where there was no clash of interests between the States.

Morris v. Jones, 329 U.S. 545, 553 (1947).

As the basis for avoiding Full Faith and Credit, Mr. Digirol argued to the New York Court of Appeals that the Missouri court lacked jurisdiction over him.[3] We submit that this response begs the critical question.

It cannot be disputed that Missouri had jurisdiction over Transit Casualty Company. Transit was a Missouri corporation.

> How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority [citations omitted].

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3. No other infirmity was or, we submit, could have been argued. There is nothing inherent in an Order liquidating an insurance company which renders it unfit for Full Faith and Credit consideration. *See, e.g., Superintendent of Ins. of the State of N.Y. v. Hostetler,* 668 F. Supp. 1057 (N.D. Ohio 1986), *aff'd,* 826 F.2d 1065 (6th Cir. 1987); *Moody v. Texas,* 520 S.W.2d 452 (Tex. App. 1975); *O'Malley v. Wilson,* 182 Ga. 97, 185 S.E. 109 (1936).

Chicago Title and Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp., 302 U.S. 120, 127-128 (1937). There can simply be no question concerning

> ... the power which the State has, and upon every ground of public policy must always have, over corporations of her own creation.... The right to exist as a corporation, and its authority in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they may be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence [citation omitted].

Chicago Life Ins. Co. v. Needles, 113 U.S. 574, 579-580 (1885).

The existence of such power in the state of incorporation is not only wholly unremarkable. It is a power, the knowledge of which the law will necessarily impute to all persons dealing with a corporate entity. Simply put, corporations go bankrupt. When they do, the effect will necessarily be that they are unable to continue compliance with contractual obligations. As long ago stated, and often repeated, by this Court:

> A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and nonuser. Every creditor must be presumed to understand the nature

> and incidence of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter.

Mumma v. Potomac Co., 33 U.S. 281, 287 (1834); *See also, e.g., Canada Southern Railroad Co. v. Gebhard*, 109 U.S. 527 (1883). To the same effect, see *Martyne v. American Union Fire Insurance Co.*, 216 N.Y. 183, 193, 110 N.E. 502 (1915), where the Court stated:

> Since a corporation can have no existence aside from the law which creates it, much of the statute law of the corporate domicile may be said to accompany it into the foreign jurisdiction and enter into, influence and control its transactions. The statutes of Pennsylvania immediately affecting the existence of the corporation are binding upon creditors in New York. Every person dealing with the defendant corporation did so with knowledge of its charter and its charter rights. In case of insolvency it was at all times subject to dissolution and in such case title to its property by virtue of the statute became vested in the insurance commissioner [citation omitted].

It is thus clear that those dealing with a corporation, and specifically an insurance corporation, do so with imputed knowledge and acceptance of the power of the state of incorporation to liquidate the company and to enforce thereby the law attending such liquidation.

The power to adjudicate that an insurance company be liquidated must *ipso facto* include the power to cancel all outstanding policies and preclude any claim for subsequently occurring loss. This doctrine was not only firmly

established in New York prior to the Order in this case, *e.g., People v. Commercial Alliance Life Ins. Co., supra*, 154 N.Y. 95, and remains the law in Missouri, *e.g., Thomas v. Land*, 225 Mo. App. 216, 30 S.W.2d 1035 (1930); *Carr v. Union Mut. Fire Ins. Co.*, 28 Mo. App. 215 (1887), but is the established rule throughout the United States. See Anno., *Fire Insurance: Insolvency of, or Appointment of Receivership for, Insurer as Affecting Subsequent Losses*, 79 A.L.R. 1267, and cases cited therein.

Underlying this rule is a policy consideration which is the bedrock not only of the law governing insurance insolvencies, but the law governing all bankruptcies, a factor clearly recognized by the New York Courts:

> A pre-eminent purpose of Article XVI [now Article 74] of the Insurance Law is to "insure equitable treatment for its creditors and to avoid preferences" (cf. *Pink v. Title Guar. & Trust Co.*, [274 N.Y. 167], 171) upon the liquidation of an insurer.... The amount to be paid to any of the creditors and claimants of an insolvent insurance company is determined by the total fund available therefore and their rights *inter sese*. Any diminution of the estate or any inequality in the treatment of like parties affects every creditor and claimant.

Matter of Knickerbocker Agency Inc. (Holz), 4 A.D.2d 71, 73, 162 N.Y.S.2d 822 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 245, 149 N.E.2d 885, 173 N.Y.S.2d 602 (1958).

In order to assure the equitable treatment of all creditors, the law recognizes the need to identify a specific date and time at which the rights of all creditors will be determined. Again, the considerations underlying this rule were expressed long ago by the New York Court of Ap-

peals in *People v. Metropolitan Surety Co.*, 205 N.Y. 135, 145, 98 N.E. 412 (1912):

> If a different rule were applied in the case under consideration, upon what principle could it be placed and where would the line be drawn? If distribution had been made on the day that the permanent receiver was appointed, as it is in theory but cannot be in practice, the claimant would have had no debt and could have received no dividends, except on the unearned portion of the premium, if any, which is not here involved. The delay that has ensued was owing to action by the courts in carrying out a command of the sovereign power of the state and it was necessary in order to convert the assets into money, but this did not change the rights of existing creditors, nor bring in a new class such as the claimants and others who had no debts when, if possible, distribution would have been made.

To the same effect, see *Carr v. Hamilton*, 129 U.S. 252 (1889).

Thus, it is the date of the Order of Liquidation, or such other date as is there fixed for the purpose (in this case, December 20, 1985), at which point the status and rights of all creditors become fixed:

> The claims of creditors are presentable when the receiver is appointed, and that date fixes their status and amount, regardless of when they are in fact presented. As we said in a recent case, "it is the day on which the court practically takes possession of the assets of the company for the purpose of distribution among its creditors, and consequently (that) is the day on which the rights of creditors should be ascertained

and the value of their claims determined" [citation omitted].

People v. American Loan & Trust Co., 172 N.Y. 371, 378, 65 N.E. 200 (1902).

Thus a state's right to terminate an insurance company's policies is inherent in its unquestioned power to liquidate the insurance company. Any other rule would render liquidation ineffective and violate the equitable principles involved. This underscores the rule recognized throughout the country: policies of an insolvent insurer are cancelled by the Order of Liquidation, as a matter of law, with respect to all future obligations to any policyholder. *Carr v. Hamilton, supra; Hobbs v. Occidental Life Ins. Co.*, 87 F.2d 380, 384 (10th Cir. 1937), *cert. den. sub nom Beck v. Occidental Life Ins. Co.*, 305 U.S. 603 (1938); *North River Ins. Co. v. Walker*, 65 F.2d 116, 118 (8th Cir. 1933); *Fuller v. Wright*, 147 Ga. 70, 92 S.E. 873, 875 (1917); *Kuhl v. General American Life Ins. Co.*, 56 Ga. App. 424, 192 S.E. 831, 833 (1937); *Todd v. German-American Ins. Co. of N.Y.*, 2 Ga. App. 789, 59 S.E. 94, 96 (1907); *Reliance Lumber Co. v. Brown*, 4 Ind. App. 92, 30 N.E. 625 (1892); *Casteel v. Kentucky Home Life Ins. Co.*, 258 Ky. 304, 79 S.W.2d 941, 943 (1935); *Crist, as Receiver for Transit Cas. Co. v. Benton Casing Service*, 572 So.2d 99, 102 (La. App. 1990), *cert. den.*, 573 So.2d 1143 (La. 1991); *Commissioner of Ins. v. Massachusetts Acc. Co.*, 314 Mass. 558, 565, 50 N.E.2d 801 (1943); *Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 119 Mass. 45, 51 (1875); *State ex rel. Schaefer v. Minnesota Title Ins. & Trust Co.*, 104 Minn. 447, 116 N.W. 944 (1908); *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 68 N.W. 28, 29 (1896); *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N.W. 772, 773 (1891); *Clay v. Independence Mut. Ins. Co.*, 359 S.W.2d 679 (Mo. 1962); *Thomas v. Land, supra*, 225 Mo. App. 216, 30

S.W.2d 1035; *Carr v. Union Mut. Fire Ins. Co., supra*, 28 Mo. App. 215; *Doane v. Millville Mut. Marine & Fire Ins. Co.*, 43 N.J. Eq. 522, 535, 11 A. 739 (1887), *revd. on oth. grds.*, 45 N.J. Eq. 274, 17 A. 625 (E. & A. 1889); *Dean & Son's Appeal*, 98 Pa. St. 101 (1881); *See generally, Neblett v. Carpenter*, 305 U.S. 297 (1938); *Lac d'Amiante du Quebec, Ltee. v. American Home Assur. Co.*, 864 F.2d 1033, 1046 (3d Cir. 1988) ("The liquidation order abruptly uproots contracts previously entered into by the insurer in order to prevent the assets of the company from wasting away and to give the liquidator additional time in which to evaluate the proper course of action").

In the light of the inherent power of the State of Missouri to liquidate Transit and cancel its policies, Mr. Digirol's assertion of lack of jurisdiction, we submit, falls by the wayside. *See, Ballesteros v. New Jersey Property Liability Insurance Guaranty Association*, 530 F. Supp. 1367, 1371 (D.N.J.), *aff'd*, 696 F.2d 980 (3d Cir. 1982). Certainly, Mr. Digirol's imputed knowledge and acceptance of the rule that his policy would be cancelled upon liquidation as a matter of law satisfy due process considerations no less than the rule permitting exercise and implementation of a court's power over a common fund notwithstanding the absence of specific notice to each individual affected. *See, Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915). Such determinations have time and again been held to demand Full Faith and Credit from sister states. *See, Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 75 (1938); *Padway v. Pacific Mutual Life Insurance Co.*, 42 F. Supp. 569 (E.D. Wis. 1942); *Larson v. Pacific Mutual Life Ins. Co. of California* 373 Ill. 614, 27 N.E.2d 458, *cert. den.*, 311 U.S. 698 (1940): *Taylor v. Pacific Mutual Life Ins. Co.*, 214 N.C. 770, 200 S.E. 882 (1938); *See generally, Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. den.*, 434 U.S. 1068 (1978).

The Court of Appeals, moreover, did not premise its

resolution upon any purported violation of due process rights. Rather, it ignored the Missouri Order of Liquidation and its cancellation of policies. It presumed to determine that the Missouri Order misapplied contract law in failing to require notice under the provisions of the insurance policy being cancelled. Aside from being a sharp departure from established law, this constitutes precisely the inquiry into an order's compliance with substantive law which a sister state *cannot* undertake if Full Faith and Credit is to have meaning.

3. The Order Sought To Be Reviewed Sets A Dangerous Precedent And Can Have Unforeseen Consequences.

The context in which the Court of Appeals reached its determination gives stark evidence of its potential impact. New York, along with virtually all other states, is a subscriber to the Uniform Insurers Liquidation Act. As the dissenting opinion noted at the New York Court of Appeals, the effect of refusing to recognize the cancellation of policies "effectively undermine[s] the goals of the Uniform Act and inject[s] a new uncertainty into the liquidation process." 79 N.Y.2d at 24. That virtually all other jurisdictions accept the binding effect of the cancellation of policies in Liquidation Orders underscores the impact.

The uncertainty is not at all limited to circumstances in which an insured has not received actual notice of the cancellation of the policy in accordance with the policy terms. What of policies which, by their terms, are *non-cancellable, regardless* of notice? Clearly, under the theory espoused by the New York Court of Appeals, the right to continuation of the policy would be deemed "vested", thus preventing a sister state from effectively cancelling as part of a Liquidation Order policies issued to New York

residents which are by their terms "non-cancellable". Such a result flies in the face of the recognition by this Court and others that liquidation *does* have the effect of cancelling such policies and permits only a claim for their value as of the date of liquidation. *See, Neblett v. Carpenter, supra*, 305 U.S. 297.

The result of the decision below would thus decimate the liquidation process. No effective means could exist to terminate future liabilities of insurance companies if each state could determine for itself, as a matter of its contract law, which policies could be terminated by liquidation of a foreign insurer and which could not, and upon what conditions and circumstances. The conclusion of the New York Court of Appeals in this matter thus not only departs from established law and undermines the authority of a state to terminate the existence of a corporation which it created, but directly threatens the uniform procedure for the liquidation of insurance companies established by states throughout the nation. The Order should not be permitted to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

1 No. 236
In the Matterof Transit
Casualtv Company
Alan Digirol,
Appellant,
v.
Superintendent of Insurance &c.,
Respondent,

Norman A. Palmiere, for appellant.
David B. Hamm, for respondent.

OPINION
This opinion is uncorrected and subject to revision before publication in the New York Reports.

WACHTLER, CH.J.:

Claimant owned a small hotel which was destroyed by fire and which was insured by a company now insolvent and in liquidation by order of a Missouri court. He seeks to share as a creditor in the available assets, but the Superintendent of Insurance has rejected his claim on the ground that the liquidation order cancelled all of the company's policies on a specified date, before the fire occurred. Claimant was not a party to the liquidation proceedings and, as both lower courts held, received no actual or constructive notice of the cancellation order before sustaining the loss. Although the policy provides that it cannot be terminated unless the insured receives prior written notice of cancellation, the courts below upheld the Superintendent's determination concluding that the claimant's rights under the policy were extinguished by

operation of law when the company was placed in liquidation.

On this appeal claimant urges that the order of the Missouri court did not extinguish vested rights and that he had a vested right to prior notice of any cancellation before the policy could be effectively terminated, which he did not receive. He also contends that he had a due process right to some form of actual notice before the court cancelled the policy because it is fundamentally unfair for the State to deprive a person of insurance protection under an existing contract without, at least, giving the insured notice of the cancellation order and a reasonable opportunity to obtain another policy to cover the risk.

We have concluded that there is merit to the claimant's first argument and, therefore, reverse the order of the Appellate Division without reaching the constitutional issue.

In 1984, the claimant, Alan Digirol, owned the Alton Hotel, located in Sodus, New York. Through a local insurance agent he purchased a multi-peril policy, including fire insurance, for the hotel. The policy was issued by the Transit Casualty Co., a foreign corporation, domiciled in Missouri, with its principal place of business in California, but also authorized to do business in New York. The term of the policy was three years, beginning on February 29, 1984, and ending on February 29, 1987. The policy also provided for cancellation before the expiration date "by mailing to the named insured at the mailing address shown in the Declarations, written notice stating when not less than ten days thereafter such cancellation shall be effective."

On December 4, 1985, a Missouri court found that Transit was insolvent and ordered that it be liquidated. A permanent receiver and deputy special receiver were appointed to administer the liquidation. The liquidation order further provided: "All policies of insurance issued

by defendant Transit Casualty Company cancelled effective at midnight on December 20, 1985." Pursuant to the Uniform Insurer's Liquidation Act (Insurance Law § 7410[a]), the Supreme Court of this State appointed the New York Superintendent of Insurance as ancillary receiver with respect to Transit's assets and creditors located here.

On December 6 and 10, the deputy receiver had the liquidation order published in the New York Law Journal. Before the effective date of the cancellation order, he also mailed letters to all policyholders notifying them of the cancellation. Included with the letter was a copy of the liquidation order and a memo informing the policyholders that, although the court had specified December 20 as the date of termination, "many states require a longer period from the order of liquidation until the date of policy cancellation" and that some guaranty associations "might afford you some protection" beyond that date. The memo concluded by advising policyholders to consult local counsel if a claim arises after the cancellation date specified in the liquidation order.

This notice was mailed to the claimant on December 15, but was sent to claimant's old address, although reference to the insurance policy would have revealed claimant's correct current address under "policy changes." When the post office returned the letter as undeliverable, the deputy receiver simply placed it in the file and made no further effort to notify claimant.

On February 16, 1986, the Alton Hotel was destroyed by fire. When Digirol attempted to collect on the policy, he learned that Transit was in liquidation and that all claims would have to be submitted to the receiver or ancillary receiver. He then submitted a claim to the Superintendent, but it was disallowed on the ground that the policy had been cancelled by order of the Missouri court before the fire occurred. Claimant objected, arguing

that he never received notice of the cancellation as required by the policy. The Superintendent reconsidered the claim but again rejected it, noting that the liquidation order cancelling the policies did not require notice and by its terms became effective on December 20, 1985. The Superintendent also indicated that notice of the cancellation had been mailed to the claimant, but claimant denied receiving it.

The matter was referred to a referee, who concluded, after a hearing, that notice was published and mailed as indicated above, but found that the claimant did not actually have notice of the Missouri liquidation proceeding or the court-ordered cancellation prior to sustaining the loss. He recommended that the claim be allowed because publication and mailing to a prior address, when the current address was available, did not constitute prior written notice as required by the policy for an effective cancellation. The Supreme Court confirmed the referee's factual findings but disaffirmed the conclusions of law and sustained the Superintendent's determination. The Appellate Division affirmed.

The courts below held, in essence, that the Missouri order placing Transit in liquidation terminated all of the claimant's future rights under the policy, including the right to prior written notice of cancellation as well as the right to continued insurance protection for future losses. On this appeal claimant concedes that he had no absolute right to continued insurance coverage, but urges that he had a right to be notified of cancellation before it could be deemed effective. The question is not whether this provision called for future performance on the part of the insurer or its successors, but whether the claimant's right to notice of cancellation was matured or vested at the time of liquidation. As the Superintendent concedes, the contractual obligation to pay for losses suffered prior to insolvency survives liquidation and the policyholder is entitled to

share as creditor in the available assets to the extent of the loss because the obligation to pay was ripe at the time of liquidation (*Matter of Empire State Surety Co.*, 214 NY 553; *see also*, Couch on Insurance 2d, § 22:74). But the obligation to pay is not the only obligation that may be mature at the time of liquidation. For instance, if a policy providing for liability coverage also obligates the company to furnish legal representation to the insured, an order liquidating the insurer for insolvency after an accident has occurred will not terminate the matured obligation to defend the pending suit and the future cost of the defense will be allowed as a claim against the insolvent's estate (*Matter of Empire State Surety Co., supra; see also, Matter of Consolidated Mut. Ins. Co.*, 77 NY2d 144 [order terminating an insolvent insurance company's liabilities did not terminate right of retired employees to lifetime health care benefits when those rights vested pursuant to statute before the company was placed in liquidation]).

In the case now before us the claimant's fire insurance policy was subject to cancellation during its term, but only if prior written notice of the cancellation was mailed to the insured. This created a distinct contractual right, which must also be recognized as a valuable property right deserving of protections (*see e.g., Brock v. Roadway Express Inc.*, 481 US 252), in addition to the primary insurance protection. The right to notice of cancellation gave the policyholder the additional assurance that if coverage was discontinued, he would be informed of the fact that his property was again at risk so that he could obtain another poicy to insure against the risk. The requirement that the notice precede the cancellation enhanced this right by assuring the policyholder that the opportunity to obtain coverage from another company would be available before there was a lapse in coverage. At the time of liquidation in this case that right matured and what remained to be done was for the company, or its successor, to

perform the contractual obligation by informing the insured of the impending cancellation. That obligation to give notice of cancellation could not be satisfied by publication, or mailing notice to the wrong address, when the correct current address was included in the policy (*see, McCann v. Scaduto*, 71 NY2d 164; *cf., Allstate Ins. Co. v. Altman*, 21 Misc2d 162; *Bayard v. Royal Indem. Co.*, 49 NY2d 60).

The Superintendent contends that recognition of a vested right to notice is inconsistent with the orderly and equitable administration of liquidation proceedings because the rights of all creditors must be fixed and valued as of the date the proceeding commenced. Since the insured had suffered no loss as of that date, the Superintendent urges that he was only entitled to return of the unearned premium and his policy should be valued accordingly.

Statutes providing for the liquidation of insolvent insurance companies are designed to protect creditors, policyholders and the general public by providing a comprehensive and efficient means for collecting the insolvent's assets and equitably paying the claims of creditors (*Knickerbocker Agency v. Holtz*, 4 NY2d 245; *Matter of Empire State Surety Co.*, 214 NY 553). The present liquidation procedures and practices are not as inflexible as the Superintendent urges. The traditional rule that creditors' claims should be valued as of the date of dissolution was intended to insure equal treatment of creditors similarly situated and, as the Superintendent recognizes, now may be changed by court order fixing a different date for making the valuation (*Matter of Empire State Surety Co., supra; see also*, Insurance Law § 7405[b]). In addition, policyholders' rights to coverage may continue for some time after the entry of the dissolution order when, as here, the court orders that cancellation shall occur at some future date (*see also, e.g., Matter of*

Professional Ins. Co. of N.Y. [Jason - Superintendent of Ins. of N.Y.], 67 AD2d 850, *affd* 49 NY2d 716). This procedure allows, and undoubtedly contemplates, notice to policyholders that their current insurance protection is about to be terminated.

In fact, in this case the receiver utilized this period to send notice to the policyholders of the impending cancellation and, in most instances apparently, the insured received notice prior to the effective date. The problem here is not that the liquidation process foreclosed prior notice of cancellation, but that the receiver sent claimant's notice to the wrong address. In addition, the receiver knew or should have known that the notice was misdirected when the letter containing the notice was returned by the post office. Nevertheless, despite the fact that the correct current address was listed on a policy document, nothing further was done to notify the insured before the loss occurred nearly two months after the company was placed in liquidation.

What occurred here is analogous to the failure to notify a creditor in a liquidation or bankruptcy proceeding of the time within which claims must be submitted (*see, e.g.*, Insurance Law § 7432[b]). The orderly administration of such proceedings contemplates that all claims will be submitted within a limited time frame fixed by the court and that claims submitted after that time will be disallowed. However, a creditor's right will not be extinguished, and an untimely claim must be allowed, when the creditor has not received notice of the order establishing the time limit (*City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 US 293). Similarly, in this case, the court's order cancelling the insurance policies on a fixed date should not extinguish the claimant's coverage where he received no notice of the impending cancellation, which the State, as successor to the insolvent corporation, was bound to provide. Allowing this claim for loss sustained

after the court ordered the cancellation is not inequitable to other policyholders who were informed of the court's order and thus had an opportunity to continue their coverage by obtaining new policies. As to those policyholders, return of the premium should make them whole.

The conclusion we have reached is not inconsistent with the letter or spirit of the Uniform Insurer's Liquidation Act as the dissent contends. The specific goals of the Uniform Act are set forth in a prefatory note identifying particular aspects of state liquidation proceedings which caused unwarranted dissipation of the assets of defunct multi-state insurers (13 Uniform Ann. [Master ed], pp. 429-430; *see also, Murphy Co. v. Reserve Ins. Co.*, 54 NY2d 69, 76-77). The various state laws requiring notice of cancellation to policyholders was not identified as a wasteful procedure needing reform, and nothing in the Act obligates states subscribing to its terms to abandon statutory or decisional law requiring notice of cancellation to be sent to policyholders before an insurance contract is cancelled (*see, e.g., Dardar v. Insurance Guar. Assn.*, 556 So2d 272 [La Ct App]). On this and many other aspects of the liquidation process the Uniform Act is silent because it was not intended as a comprehensive scheme displacing all state laws, substantive and procedural, relating to liquidation of insolvent insurance companies. The Uniform Act, for instance, does not require that creditors be notified of the time fixed for submitting claims (Uniform Insurer's Liquidation Act, § 2, § 5), but it does not follow from this that state laws requiring such notice (*see, e.g.*, Insurance Law § 7405[a]) are ineffective when the insurance company has been liquidated in another jurisdiction subscribing to the Act.

The overall purpose of the Uniform Act, like liquidation proceedings generally, is not only to preserve available assets for the benefit of creditors, but to protect the interest of persons who purchased insurance policies from a company which has become insolvent. Requiring state officials liquidating the company to notify policyholders that this or another state has terminated the contract on which they rely is not inconsistent with that goal, particularly when the insured persons have paid for the right to receive such notice so that they may continue insurance protection by obtaining another policy.

Accordingly, the order of the Appellate Division should be reversed, with costs, and claimant's cross motion to confirm the referee's report granted.

Matter of Transit Casualty Co. v.
Superintendent of Insurance

No. 236

KAYE, J. (dissenting):

Transit Casualty Company--domiciled in Missouri, with its principal place of business in California--in December 1985 was declared insolvent and placed in liquidation by order of the Circuit Court of Cole County, Missouri. The Order of Liquidation made no provision for notice to Transit's approximately 100,000 policyholders. The court's order simply recited "All policies of insurance issued by defendant Transit Casualty Company cancelled effective at midnight on December 20, 1985."

Although not required by the court to do so, the Missouri receiver nonetheless mailed notice to all Transit policyholders; he also arranged for publication of notice of Transit's liquidation in states where the company had been authorized to do business, including New York. Because the Missouri receiver misaddressed the envelope directed to claimant, however, claimant was unaware that his insurance coverage had been terminated at the time of his loss in February 1986. Claimant seeks to recover his loss from the New York Superintendent of Insurance, Transit's ancillary receiver (and the New York Property/Casualty Insurance Security Fund), on the theory that he was entitled under his policy to ten days' notice before the insurer could cancel his coverage.

This Court now agrees with claimant, holding New York liable for Missouri's misfeasance. The majority arrives at this result by concluding that the notice provisions

contained in claimant's policy of insurance--and presumably, therefore, the notice provisions contained in every policy issued by foreign insurers licensed in this State--were "vested" at the time of the company's liquidation, and consequently survive liquidation to bind the New York ancillary receiver. In that this conclusion lacks any basis in law and adds unwarranted uncertainty to liquidation proceedings involving multi-state insurers, I must dissent.

As claimant acknowledges, all insurance policies issued by Transit could be cancelled by operation of law upon the insurer's liquidation. In liquidations, creditors with unconditional claims against the insolvent insurer at the time of liquidation--for example, policyholders who had incurred liability to others or had been sued by those making claims against them--of course possess certain, fixed obligations of the insurer (*see, Matter of Empire State Surety Co.*, 214 NY 553, 565-566; *see also, People v. Metropolitan Surety Co.*, 205 NY 135, 145-147 [slip opn at 6]). By the same token, policyholders of a bankrupt insurer are entitled to the return of unearned premiums--again, an unconditional obligation owing at the time of liquidation (slip opn at 6).[1] In each example, the contractual liability surviving liquidation--the debtor/creditor relationship--is fixed at the time the company ceases its existence, and the claims may be accounted for in facilitating the equitable distribution of the insurer's assets. No comparable liability is to be found here.

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1. The majority's citation to *Matter of Consolidated Mutual Ins. Co.* (77 NY2d 144; slip opn at 6) is disturbing. That case involved the obligation to continue retirement benefits provided to the insurer's employees and turned on the application of settled legal principles developed under the ERISA vesting scheme. The narrow holding of that case, in an area of law with unique policy concerns, should not be used to justify the unsettling of settled law in another heavily regulated area with its own distinct policy considerations. *Consolidated Mutual* provides no support for the recognition, in a liquidation proceeding, of the executory promise to give notice.

While the Court speaks of a "vested" right to notice, hinting at due process protections attendant on a loss of property rights, its legal analysis is explicitly premised solely on contract law, not constitutional law (slip opn at 2): "what remained to be done [at liquidation] was for the company, or its successor, to perform the contractual obligation" of giving notice of cancellation (slip opn at 7). Thus, unlike a due process requirement of "reasonable" notice, the Court's contract rationale, for this and future cases, binds New York ancillary receivers of foreign insolvents to the actual contract terms found in the insurers' individual policies with New York residents. Moreover, the Court is imposing an even greater duty on the Superintendent than the contract imposed on the insurer. Rather than notification in the event of cancellation by the insurance company--Transit's contractual obligation--the Superintendent must give notice upon cancellation by operation of law, an event clearly not covered by the contract provision.

There is no precedent for this novel conclusion; none is cited. The majority at most offers the "analogous" situation of a creditor in a liquidation or bankruptcy proceeding (slip opn at 9). Any relationship between the two, however, is elusive. That an insured may be a creditor for purposes of a fixed obligation arising prior to liquidation does not support the quite different conclusion that an insured is also a "creditor" for notice purposes. Are all executory contract obligations--or the expectation that the obligation will be fulfilled--now to be considered "vested" at the time of entry of a liquidation order? That would signal a remarkable change in the law.

Although the majority concludes that the "present liquidation procedures and practices are not as inflexible as the Superintendent urges" (slip opn at 8), a review of the law in this heavily regulated area reveals that the majority's holding is contrary to the uniform scheme established for liquidation of multi-state insurers.

The Uniform Insurers Liquidation Act was adopted in 30 states, including New York, in order to provide "a uniform system for the orderly and equitable administration of the assets and liabilities of defunct multi-state insurers." (*Murphy Co. v. Reserve Ins. Co.*, 54 NY2d 69, 77; *see*, Insurance Law § 7415.) Significantly, the uniform act contains no provision for notification to policyholders. It does provide that in a "delinquency proceeding in a reciprocal state [Missouri for example], claimants residing in this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary proceeding." (Insurance Law § 7412[a].)

It is clear, however, that whatever date is set by the court in the domiciliary state will henceforth have no effect on claims made against the ancillary receiver in New York, although the New York Legislature has seen fit to adopt the uniform act and is--or was--a "reciprocal" State. A New York claimant with a "late" claim would certainly file against the ancillary receiver, whose exposure to liability under the policy might be far greater than that of its out-of-state counterpart.

Moreover, liability may extend beyond the assets of the defunct insurance company, as such claims may eventually be allowed against the insurance security fund established pursuant to article 76 of the Insurance Law (*see, Matter of Professional Ins. Co. of NY*, 67 AD2d 850, *affd* 49 NY2d 716). The majority's statement that allowing this claim "is not inequitable to other policyholders who were informed of the court's order and thus had the opportunity to continue their coverage" (slip opn at 10) misses the point. As the court in *Matter of Professional Ins. Co.* noted, the prejudice in such a case would arise because "there exists a potential for dilution of timely filed claims, and because the security fund is built up with

premiums from policyholders of all carriers * * * they will be burdened with additional premiums to replenish the fund earlier than contemplated" (67 AD2d at 851; *see also, Alliance of American Insurers v. Chu*, 77 NY2d 573). What better example of the "unwarranted dissipation" of assets (slip opn at 10) than the dilution of timely filed claims in ancillary receivership proceedings?[2]

Thus, the majority has effectively undermined the goals of the uniform act and injected a new uncertainty into the liquidation process, uncertainty that translates into potentially greater liability for the New York ancillary receiver and security fund. As the present case demonstrates, the New York Superintendent, when acting as ancillary receiver for a foreign insurer, can protect itself against liability, and establish a firm date for filing claims, only by securing the books and records of the company and mailing notice of the liquidation to all New York policyholders. Even then, the ancillary receiver necessarily remains liable for any losses incurred by policyholders during the "window" period. Moreover, the New York Superintendent will also have to inspect each policy to satisfy compliance with contractual notice provisions, since we now declare that the right to the notice specified in each policy "vests" upon the insurer's liquidation. There is no basis in the law of contracts for the imposition of such an onerous responsibility.

At the very least, the Court's conclusion points up the need for statutory reform, to provide for notice to policyholders in a way that discourages forum-shopping and assures the objectives of fairness and uniformity that were seemingly secured by adoption of the Uniform Insurers Liquidation Act.

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2. The prefatory note to the Uniform Act, in commenting on dissipation of assets, attributes the problem to the fact that domiciliary receivers previously had little authority in nondomiciliary states. The Court's decision in effect restores that problem. Once again, domiciliary receivers and, most importantly, the cut-off dates set in domiciliary states, will have no impact on the filing of claims in this jurisdiction, undermining the reciprocal rights granted under the Uniform Act (*see*, 13 Uniform Ann. [Masters ed], pp. 429-430; *see also*, Insurance Law § 7412[a]).

Order reversed, with costs, and claimant's cross motion to confirm the referee's report granted. Opinion by Chief Judge Wachtler. Judges Simons, Alexander and Bellacosa concur. Judge Kaye dissents and votes to affirm in an opinion in which Judges Titone and Hancock concur.

Decided January 14, 1992

Remittitur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

No. 236

In the Matter of Transit
Casualty Company.
Alan Digirol,

Appellant,

v.

Superintendent of Insurance & C.,

Respondent.

The appellant in the above entitled appeal appeared by Palmiere & Pellegrino, P.C.;
the respondent appeared by William F. Jerome, Esq. By: Herzfeld & Rubin, P.C.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and claimant's cross motion to confirm the referee's report granted. Opinion by Chief Judge Wachtler. Judges Simons, Alexander and Bellacosa concur. Judge Kaye dissents and votes to affirm in an opinion in which Judges Titone and Hancock concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, January 14, 1992.

APPENDIX B

January 30, 1991

Sullivan, Rosenberger, Wallach, Asch, Smith, J.J.

42138 In re Ancillary Receivership of Transit Casualty Company - Alan Digirol,

Claimant-Appellant,

- against -

Superintendent of Insurance as Ancillary Receiver of Transit Casualty Company,

Respondent.

Claim No. W-507549

Order, Supreme Court, New York County (Martin Evans, J.) entered on or about May 23, 1990, which granted a motion by respondent disaffirming a referee's report to the extent of disaffirming the legal conclusions, unanimously affirmed, without costs.

The insurer was placed in liquidation by an amended order of the Circuit Court, Cole County, State of Missouri entered on or about December 4, 1985. The Superintendent was appointed ancillary receiver by order of the Supreme Court, New York County (Hughes, Thomas, J.) entered on December 26, 1985. The IAS court ordered a hearing before a referee on the issue of whether or not claimant received notice that the policy issued by the insurer was cancelled, and whether or not any such notice was necessary. The Referee concluded as a matter of fact that no notice was given, and concluded as a matter of law that notice was required. The IAS court confirmed the Referee's factual finding, but disaffirmed his legal conclu-

sion. This was correct. Both under New York law and under Missouri law, an insured has no further rights against the insurer as of the date the insurer is placed in liquidation (*People v. American Loan & Trust Co.*, 172 NY 371; *Thomas v. Land*, 225 MO.App. 216, 30 SW2d 1035). In light of this rule of law, which the claimant concedes, the claimant cannot be said to have had a due process right to the insurance policy after the date of liquidation. Just as there is no due process right prior to the date that right is created by law (*Jewish Memorial Hospital v. Whalen*, 47 NY2d 331, 340), there is no due process right after it has been extinguished automatically by operation of law.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: January 24, 1991

_____

Clerk

APPENDIX C

At an IAS Term, Part 36, of the Supreme Court of the State of New York in and for the County of New York at the Courthouse, 60 Centre Street, New York, New York, on the 21st day of May, 1990

PRESENT:

HON. MARTIN EVANS,

Justice.

In the Matter of the Ancillary
Receivership of
TRANSIT CASUALTY COMPANY

Claimant: ALAN DIGIROL

Claim No.: W-507549

Index No.
43846/85

ORDER

A motion having been duly made by the Superintendent of Insurance of the State of New York, as Ancillary Receiver of Transit Casualty Company, by its counsel, Herzfeld & Rubin, P.C., for an Order (a) disaffirming the report of the Hon. Benedict Ginsberg, Referee, dated November 2, 1989, (b) confirming the determination of the Superintendent disallowing the instant claims from participation in the New York Property/Casualty Insurance Security Fund, and (c) dismissing claimant's objections to that determination; and

A cross-motion having been duly made by claimant Alan Digirol, by his attorneys, Palmiere & Pellegrino,

P.C., for an Order (a) confirming the above-noted Report of Referee Ginsberg, (b) overruling the determination of the Superintendent which disallowed the instant claims, and (c) sustaining claimant's objections to said determination;

AND, the said motion and cross-motion having duly come to be heard before this Court on April 24, 1990;

NOW, upon reading and filing the Report of Hon. Benedict Ginsberg, Referee, dated November 2, 1989; the Notice of Motion, dated February 27, 1990, the Affidavit of David B. Hamm, sworn to February 27, 1990, with exhibits, and the Memorandum of Law submitted in support of the motion; the Notice of Cross-Motion, dated March 22, 1990, the Affidavit of Norman A. Palmiere, sworn to March 23, 1990, and the Memorandum of Law submitted in support of the cross-motion and in opposition to the motion; and the Affirmation of David B. Hamm, dated April 18, 1990, in opposition to the cross-motion and further in support of the motion; and due consideration having been had; and this Court having issued its Memorandum Decision, dated April 24, 1990;

NOW, on motion of Herzfeld & Rubin, P.C., of counsel to the Superintendent of Insurance, as Ancillary Receiver of Transit Casualty Insurance Company, it is hereby

ORDERED, that the motion to disaffirm the Referee's Report is denied as to the factual findings contained in that Report, but granted as to the conclusions of law contained therein; and it is further

ORDERED, that the cross-motion to confirm the Referee's Report is granted as to factual findings but denied as to the conclusions of law contained in that Report; and it is further

ORDERED, that the Recommendation in the Report of Hon. Benedict Ginsberg, Referee, dated November 2, 1989, is disaffirmed and rejected; and it is further

ORDERED, that the determination of the Superintendent of Insurance disallowing the claims herein is confirmed; and it is further

ORDERED, that claimant's objections to the Superintendent's determination are dismissed.

ENTER:

_____

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
-NEW YORK COUNTY

PART 36

PRESENT:
Hon. MARTIN EVANS
Justice.

In Re: Transit Casualty Co.,

- against -

INDEX NUMBER 43846/85

MOTION DATE_____

MOTION SEQ. NO. 017

TRIAL CAL. NO. _____

The following papers numbered 1 to _____ read on this motion to _____
Notice of Motion/Order to Show Cause-Affidavits-Exhibits

PAPERS NUMBERED

Answering Affidavits - Exhibits

Replying Affidavits

Upon the foregoing papers it is ordered that this motion to disaffirm the report of the Referee is denied as to his factual findings, but granted with respect to his conclusions of law. He was clearly correct in his determination that the claimant had no notice of the proceedings. However, it appears to be the rule of law that the policy of insurance was cancelled, before the fire, as the result of the order of cancellation by the Circuit Court. No claim is made that the Circuit Court did not have jurisdiction over the case. The policy was issued by this Missouri insurer and was therefore subject to the laws of Missouri. *Carr v. Union Mutual Fire Ins. Co.*, 28 Mo. App. 218 appears to state the law in Missouri. New York law appears, for similar reasons, to be the same. *Peo. v. Com'l Alliance*, 154 NY 95. Settle Order.

Dated 4/24/90

April 24, 1990

_____

J.S.C.
MARTIN EVANS

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of

the Ancillary Receivership of

TRANSIT CASUALTY COMPANY

Index No. 42346/1985

CLAIMANT: ALAN DIGIROL

CLAIM NO.: W-50749

LIQUIDATION CLAIM NO.: SMP-167232

REFEREE'S INTERIM REPORT

Alan Digirol (hereinafter the "Claimant", or, the "Insured") purchased the Alton Hotel, prior to February, 1984 (p.3-4;4/17/89)* from Larry and Frances Rybak (hereinafter "Rybak", or, the "Mortgagee"). The purchase price was paid, partly in cash, with the balance payable over a term of years, secured by a mortgage on the building. (p. 20;4/17/89)

The Claimant obtained a policy of insurance (hereinafter the "Policy") through the Riedman Agency located in Rochester, New York. (p. 14;4/17/89) The policy period was three years from February 29, 1984 to February 29, 1987. (See Claimant's Exhibit 5). The policy #SMP 167232, was issued by Transit Casualty Company (hereinafter "Transit"), an insurance company domiciled in Missouri (p. 14;3/4/84) with its principal place of

*Numbers in parentheses refer first, to the page of the transcript, and then to the hearing date. The transcript of each hearing begins with the number one.

business in California. (p. 36 L.19-p.37 L.6;7/16/89) Transit was authorized to do business in New York.

The Policy identified Rybak as mortgagee, to whom "loss on building items shall be payable". (Item 7 - Mortgage Clause)

Transit was placed in liquidation by The Circuit Court of Cole County, Missouri by order made December 6, 1985, and amended order made December 10, 1985. Except as indicated below, the amended order is not significantly different from the original order, to the extent of its relevance here.

Transit was "declared to be insolvent", by the order, and "all policies of insurance issued by...Transit cancelled effective at midnight December 20, 1985." The order also appointed John Cozad, a partner in the law firm that was General Counsel to Transit, as Special Deputy Receiver for Transit (hereinafter the "Receiver"). Mr. Cozad had overall charge of the day-to-day operations of the receivership. (p.3-4;7/6/89)

Mr. Cozad testified that "we attempted to give notice, both by mailing and by publication, to insured...of...Transit...prior to that date", i.e. December 20, 1985. (p.5;7/6/89)

It is Respondent's contention that giving, or attempting to give, notice of cancellation was a voluntary act; that receipt or non-receipt by any insured, of notice of cancellation, was irrelevant (p. 10; 4/17/89) that the cancellation of all policies was effective as of December 20, 1985, by virtue of the aforesaid orders of the Missouri Court.

On February 16, 1986, a fire occurred which totally destroyed the building covered by the Transit policy. At the time of the fire, there was a substantial unpaid balance due on the Rybak mortgage. (p.57;4/17/89) The fire occurred approximately two months after the date fixed in

the Missouri orders, as the date of the cancellation of all policies of insurance, including Claimant's.

Further reference is made below to the manner in which notice of cancellation was given to the Insured. It is not claimed that notice was given to the Mortgagee (Rybak) but since Respondent claims that notice was not required to be given to the Insured, its contention would be equally valid as to the Mortgagee.

Except to the extent hereinafter indicated, none of the other policy provisions are relevant to this decision, Claimant's counsel having stated "the only issue at this time is...the...effective date of cancellation...", to which Respondent's counsel responded, "That was my understanding...". (p.12;4/17/89)

Claimant asserts that he was unaware of the adjudication of Transit's insolventy; that he did not receive any notice thereof, to which further reference is made below; that he therefore made no attempt to procure other insurance before December 20, 1985, the date fixed by the Missouri Court as the date when cancellation became effective; that he did not learn of Transit's insolvency, or of the cancellation of his policy, until after he attempted to file a claim, for the damage sustained as a result of the said fire, which occurred on February 16, 1986.

It does not appear that notice was given, either to the Insurance Agency through whom the Claimant placed the policy, or to the Mortgagee, to whom "loss on building items shall be payable", of the appointment of a receiver for Transit, in the liquidation proceeding or of the cancellation of "all policies" issued by Transit, "effective at midnight on December 20, 1985."

Respondent's contention that notice, either of Transit's liquidation, or of cancellation of all policies, was not required to be given to any policyholder. Presumably this contention also applies to notices to the insurance agency, and to the mortgagee.

This decision will address two issues: (1) Was notice required to be given, in order to effect cancellation of Claimant's policy as of December 20, 1985; and (2) Was notice in fact given, i.e. did the acts performed by Transit's Receiver constitute notice, in light of the fact that the envelope containing the documents claimed to constitute "notice" was not delivered to or received by Claimant, but on the contrary, was returned to the Receiver and said envelope (and its contents) remained in his files and were received in evidence as Respondent's Exhibit D, at the second hearing. (p.10;7/6/89)

THE MAILING

What the Receiver mailed, or attempted to mail, to the Claimant, is relevant. The "mailing" occurred in the following manner.

On or about December 15, 1985 the Receiver posted an envelope, described in detail below. The posting was from Van Nuys, California (p.14-15;7/6/89). It was addressed to "Alton Hotel, Old Ridge Road, Sodus, N.Y." (p.7;7/6/89)

The envelope, when offered in evidence, bore a number of postal marks, and rubber stamps, of postal origin. The earliest postmark, in point of time, is "a post meter mark...that indicates...Los Angeles, California, May 13, 1985" (p.11;7/6/89). That date is not quite seven months prior to the commencement of the liquidation proceeding. I accept Mr. Cozad's explanation..."it has to be some foul-up of some kind. The company was not in liquidation on May 13, 1985." (p.12;7/6/89) Accordingly, I disregard, as of no evidentiary value, the May 13, 1985 postmark.

The envelope contained (1) a letter dated December 6, 1985 on the letterhead of "Director, Missouri Division of Insurance, Receiver for Transit Casualty Company," ad-

dressed to "Policyholders...of Transit," signed by Mr. Cozad; (2) a memo or notice, dated December 12, 1985, also on the same letterhead; and (3) a copy of the "Amended Order of Liquidation and Appointment of Permanent Receiver," dated December 3, 1985.

The letter of December 6, 1985, (1) above, notified all addressees "that all policies of insurance issued by Transit are hereby cancelled, effective 12:00 midnight, December 20, 1985, in accordance with the aforementioned (enclosed) Order. All Policyholders who wish to have continuing coverage must replace these cancelled policies by purchasing insurance from another company before December 20, 1985."

The notice dated December 12, 1985 (2) above, informed policyholders that the policyholders home states may "require a longer period from the order of liquidation until the date of policy cancellation" and suggested consulting counsel to determine "the cancellation date that will be recognized in your state." The period from the order to the cancellation date, is hereby deemed diminished to 5 days, being the number of days between the date of the mailing of the notice, December 15, 1985, and the cancellation date, December 20, 1985, and diminished further, by the time required for delivery of ordinary mail from California to New York. It would thus appear, that if notice was required, to afford a policyholder an opportunity to replace the insurance before it was cancelled, the notice in evidence, was less than reasonable; less that the State of Missouri requires; and less than the period set forth in the policy.

The envelope, containing the documents described above, when received in evidence, after the return thereof to the Receiver, to whom further reference is made below, bore rubber stamp notations, probably made by more than one stamp, as follows:

RETURN TO SENDER

MOVED, LEFT NO ADDRESS

ATTEMPTED, NOT KNOWN

NO SUCH NUMBER

FWD ORDER EXPIRED (p.9;7/6/89)

NOT FOR SODUS, N.Y. (p.15-16;7/6/89)

The Claimant did not receive the envelope or its contents. Respondent's counsel conceded that "the letter was returned, however, it was addressed to the policy holder at the address given in the policy". (p.10;4/17/89)

The Claimant testified that his premises are "right next door" to the Post Office (p.18;4/17/89); that he "used to walk there every morning to get my mail"; that, in that area, mail is not delivered, but placed in the addressee's locked box; that he has access to his box, via a combination lock (p.18;4/17/89).

There were in fact, two envelopes, the one identified above, and another, from the Sodus Post Office returning the envelope in evidence and contents, also in evidence, to sender.

A time stamp on the envelope returning to the sender, what had been originally sent or addressed to the Claimant, indicates that the returning envelope mailed back to the sender, by the Sodus Post Office was mailed on December 19, 1985.

Mr. Cozad testified as to the custom and practice, with respect to envelopes that were "received back...(they)...were taken out of the (envelopes) disassembled and then restapled to the return envelope, and then they were filed or retained." (p.7-8;7/6/89)

Does the return of what was mailed, rebut the presumption that mailing is tantamount to delivery? I think it does.

When the sender knows, as precisely as he does here, that what he mailed, was not received, but was in fact returned, is the sender under an obligation to do something, to bring to the attention of the addressee, what it was that the sender sought to communicate to the addressee? I think he is.

And where, as here, the addressee is unaware that within less than five days after the mailing, his insurance will be cancelled, does the sender, by merely placing the returned communication in an office file, and doing nothing more, commit a negligent act from which some liability may flow. I think he does.

An examination of the policy indicates that the Receiver's letter and notice, were not correctly addressed, and not timely sent.

The section of the policy that sets forth "Insured's Name and Mailing Address" has, typed in "Alton Hotel, Old Ridge Road, Sodus, N.Y." Immediately below, under the caption "Policy Changes", there is typed in "Alton Hotel, c/o Alan Di Giro, 22 Greenwood Park, Pittsford, New York 14534".

The section of the Policy that relates to cancellation reads:

> "3. Cancellation. ...This Policy may be cancelled by the Company by mailing to the named insured at the mailing address shown in the Declarations, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice...the effective date and hour of cancellation stated in the notice shall become the end of the policy

period. Delivery of such written notice...by the Company shall be equivalent to mailing.

...Notice of cancellation addressed to the named insured and mailed to the mailing address shown in the Declarations shall be sufficient notice to effect cancellation of this policy."

The foregoing cancellation provision is modified by what the policy designates as, "NEW YORK AMENDATORY ENDORSEMENT", which reads:

"1. The cancellation provision of this policy is amended as follows:

The Provision of the policy requiring ten (10) days notice of cancellation by the Company is amended to forty-five (45) days. However, in the event the policy is cancelled for nonpayment of premium, only ten (10) days notice of cancellation shall be given."

It thus appears that notice of cancellation was neither timely given, nor correctly addressed, and that it was never received.

The Respondent's reliance on cancellation by the "mailing" described above, is further weakened by the testimony of Mr. Cozad, addressed to the factors relating to the "returned mail", such as its volume, its frequency and the extent to which those factors should have suggested further action by the Receiver. If the return experienced here, had been the only instance in which nondelivery came to the attention of the Receiver, that might require one kind of approach to the problem. If it occurred every day, or in considerable volume, a different approach to the problem might have been considered. But I believe it was incumbent on an officer of the court to do

something when mail, of serious consequence, comes back, undelivered.

Mr. Cozad was not forthright. He had been a member of the law firm that was General Counsel to Transit until the liquidation began. At that point the firm became Special Deputy Receiver for Transit. Mr. Cozad was the partner in "overall charge of the day-to-day operation of the receivership." (p.4;7/6/89) He moved, physically, into Transit's headquarters in Los Angeles (p.37;7/6/89). Direction had been given "by the Court that December 20 was to be the cancellation date for policies and so we attempted to give notice...prior to that date"(p.5;7/6/89), assembling "a team of people" for that purpose, all of whom worked under Mr. Cozad's "supervision and control" (p.5;7/6/89).

In that context, Mr. Cozad's inability to respond to questions put to him by Claimant's counsel and by the Referee, other than by repeatedly saying "I can't recall" or "I don't know" leads to the conclusion that Mr. Cozad was deliberately evasive. He responded "I can't recall" or "I don't know" to the following questions by Respondent's counsel (indicated by the letters "RC"); by Claimant's counsel (indicated by the letters "CC"); and by the Referee (indicated by the letter "R"), as follows:

I Q. (CC) "When you compiled this team of personnel to discharge the responsibility of (sending) cancelling notice, were you familiar with the terms and provisions of the policy requiring 10 days notice before cancellation of the policy?

A. I don't recall. (p.24;7/6/89)

II Q. (CC) The court order was filed in Cole County.... To your knowledge, that order was not filed in any other State or any other locality?

A. I can't recall.... (p.32;7/6/89)

III Q. (CC) Was there any attempt, by you or anybody working under you, to determine the identity of the agent that handled or negotiated the contract of insurance in New York State with the Transit Insurance Company and Mr. Digirol...after (you) received this notice back was there any attempt made to contact the agent...who wrote the policy?

A. I don't recall.... (p.33;7/6/89)

IV Q. (R) ...when this (mailing) came back, you knew it had not been received by the insured...did you yourself make a decision to do nothing further...?

A. I don't recall what steps were taken after that. (p.34;7/6/89)

V Q. (R) ...were any steps laid out to be taken in cases where envelopes containing the notices...were returned?

A. I don't recall.

Q. You don't recall whether there was a procedure set up or not?

A. No, I don't. (p.34-5;7/6/89)

VI Q. (R) When this one came back...you knew it had not been received by the insured?

A. Correct...

Q. Was there a conference...or did you yourself make a decision to do nothing further...?

A. I don't recall what steps were taken...

Q. Without recalling what steps were taken, were any steps laid out to be taken in cases where envelopes containing the notices...were returned?

A. I don't recall.

Q. You don't recall whether there was a procedure set up or not?

A. No, I don't. (p.34/9-35/7/6/89)

VII Q. (R) When it came back, you knew the policyholder didn't get it...(but) no action was taken, nothing was done.

A. I don't know. I don't recall, Your Honor, whether there was nor not, whether there was a second attempt to mail or something. I don't recall. (p.35/19-36/6;7/6/89)

VIII Q. (R) How many came back...you sent out 100,000, did 100 come back, did 1000 come back?

A. I don't know.

Q. Do you think more than 1000 came back, or less?

A. I really don't know...." (p.38/22-39/9;7/6/89)

In view of the foregoing, if notice of the Court's order was a precondition to cancellation of the policy, I conclude that the policy was not cancelled because notice was not given.

WAS NOTICE REQUIRED, AND IF SO, WAS IT GIVEN?

It is the Respondent's contention that the efforts made to bring to the attention of the Claimant, that the policy was about to be cancelled, were gratuitous; that the fact that the Claimant did not receive notice, may have been unfortunate, but it was irrelevant.

There can be no doubt that the Missouri Court had the right to enter an order in the liquidation proceeding, cancelling all insurance policies issued by Transit. However, the right itself, and the proper exercise of that right, are not the same thing. Until properly cancelled, the policy remained in force.

The right to cancel could not be exercised in total disregard of the policy provisions for the giving of notice to afford the insured a reasonable time to obtain other insurance.

The Respondent's reliance, on the cases cited in support of the sufficiency of constructive notice, by mail, is not warranted. Those cases support the view that notice may be deemed to have been received when the specified efforts described in those cases were performed. That may be a reasonable presumption, but it is not an irrebuttable presumption. When the known and uncontrovertible fact is that the notice was not received, but indeed was returned by the post office to the sender, the presumption falls.

The notice that the Receiver sought to enclose with the copy of the liquidation order is clear recognition, by the Receiver, of the importance to every insured, of replacing what was to be cancelled. And what is more important, clear recognition of the fact that, to quote the notice, "many states require a longer period from the order of liquidation until the date of policy cancellation", than the period stated in the liquidation order. What was

the purpose of the notice, if not to inform policyholders that the "period" allowed by the Missouri court, might not be sufficient and might be considered inadequate, by the insured's home state?

Respondent's counsel argues at page 9, et seq., of his memorandum that the situation at bar is similar to general insolvency procedures under the current Bankruptcy Code, where the right to cancel is unconditional. The comparison is inappropriate. A party whose contract with the bankrupt is terminated by the Trustee in bankruptcy is not left without a forum. He can assert his claim before the Bankruptcy Judge. If Respondent's counsel is correct, a party whose contract with the insurance company is cancelled, has no forum available to him.

The Time of the Fire

Respondent's counsel argues at page 7 of his Memorandum:

> "Beyond that, the fire took place *two months* after the cancellation of the policy and after the notice was sent. Thus, the date set for cancellation in the notice, which claimant failed to receive through no fault of the Receiver, was in no way related to claimant's loss; even if the cancellation date had been set a *month* after the notice, the same result would have occurred."

The argument is fallacious. The date of the fire is not the critical issue; the failure to give the claimant the opportunity to replace the insurance, is the critical issue. The destroyed opportunity to replace the insurance, is the basis of the claim here, assuming the Claimant was entitled to such an opportunity. In the absence of any suggestion that he would have been unable or unwilling to replace the in-

surance, it is fair to say that the damage resulting from the lost opportunity to replace the insurance, may be measured by the damage caused by the uninsured fire.

To resolve the question of law presented here, we are referred to the apparently conflicting views expressed by the Claimant's citing *Federico Macaroni Mfg. Co. v. Great Western Fire Ins. Co.*, et al, 173 LA 905, 139 So. P. 1, and the Respondent's citing *Ballesteros v. New Jersey Property Liability Insurance Guaranty Association*, 530 F. Supp. 1367.

I find *Federico*, supra, persuasive upon the basis of the following, which I quote therefrom:

> "...the general rule that a judicial decree appointing a receiver or liquidator for an insolvent insurance company terminates the outstanding insurance policies is not applicable to a case where the court that rendered the decree had no jurisdiction over the person of the policyholder, and especially where the latter had no notice of the decree, and hence no opportunity to protect himself by obtaining other insurance."

> "...a decree of a state court in an insolvency proceeding cannot discharge or affect an obligation which the insolvent owes to a nonresident creditor who has not voluntarily become a party to the proceeding."

> "The insurance company was under obligation to protect the Federico Company...against loss by fire, so long as the insurance company did not see fit to notify the Federico Company of an intention to cancel the policy and give the Federico Company the opportunity to obtain such protection elsewhere. That obligation...was not discharged by the insolvency of the insurance company, and could not be

discharged by effect of the decree of the Illinois court, for want of extraterritorial jurisdiction on the part of the court."

I find that *Ballesteros*, supra, has no relevance to the subject situation. To begin with, the insured in *Ballesteros*, supra, personally received notice of cancellation. The opinion states at page 1373:

"The purpose of requiring that notice be given prior to the cancellation of an insurance policy is to allow the insured ample time to locate another insurer and thereby avoid an interruption in coverage. If constructive notice, through public recordation, satisfies this purpose, then a fortiori, actual notice, which is more likely to come to the attention of the insured, should be legally sufficient. Therefore, so long as actual notice was provided and the insured had a reasonable amount of time to act upon that notice, the termination is valid."

The opinion in *Ballesteros*, supra, was not based solely on the above quoted matter. But another excerpt from the opinion suggests that Respondent's reliance on that case, is unwarranted. The opinion states at page 1371:

"If notice were required to be issued to all policyholders, and all policyholders had a right to participate in the hearing, the attendant delay would defeat the policyholders' interest in preventing the dissipation of the company's assets. Because the interests of policyholders are represented by the Superintendent and protected by the state court, due process is not violated by the failure to give notice of the rehabilitation proceedings to the policyholders."

The notice referred to in the above quoted matter was not, as here, notice of the date, in the future, as of which the insured's policy will be cancelled, but notice of "the institution of the rehabilitation proceedings." The subject case does not involve that issue at all. Notice of cancellation of the insurance effective at a stated date in the future is totally unrelated to hearings on the issue of the insurance company's insolvency.

Liquidation in New York, and in Missouri, where Transit was put in liquidation, occurs on the application of the Superintendent of Insurance. The Claimant here does not contend that he was entitled to be heard on whether or not Transit was insolvent, and should be liquidated. He contends he was entitled to notice prior to the cancellation of his insurance to allow time to get a policy elsewhere, and avoid interruption in coverage. I think he is right.

Couch on Insurance, 2d, also supports Claimant's position that as a non-resident of the liquidating state he does not fall within the general rule providing for automatic cancellation where the adjudication of insolvency occurs in the same state where the property is located. *Couch*, at § 22:76 described the exception:

> "An exception is apparently made to this rule when the insolvency proceeding takes place in the domiciliary state and the policy is held by the resident of another state who has no notice or knowledge of the domiciliary's proceedings. Under such circumstances the cases hold that the risk is not terminated by the insolvency. For example, upon the ground that in the state where the insured property was located there had been no adjudication that the foreign insurer, a mutual company, was insolvent, nor any order cancelling the policy, the insurer and its surety were held liable for a fire loss which occurred after it had been adjudged insolvent and a general

receiver had been appointed in the state of its origin, and after a receiver had been appointed in the other state to collect and distribute its assets."

CONCLUSION

It is my opinion that the subject policy of insurance was not properly or effectively cancelled. The case shall resume for further testimony on such other issues, as for example, the nature and extent of Claimant's damage. The case is set down for the next hearing on December 18, 1989.

Dated: New York, N.Y.
November 2, 1989

Respectfully submitted,

BENEDICT GINSBERG

APPENDIX E

In the Matter of Transit Casualty Company—Alan Digirol, Appellant, v Superintendent of Insurance, Respondent.

Submitted February 25, 1991; decided April 25, 1991

Reported below, — AD2d —.

Motion for leave to appeal denied upon the ground that an appeal lies as of right. Cross motion to dismiss the appeal taken as of right denied.

APPENDIX F

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty *day of* April *A. D.* 1992

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 232

In the Matter of Transit
Casualty Company.
Alan Digirol,

Appellant,

v.

Superintendent of Insurance & C.,

Respondent.

A motion for reargument to the Court of Appeals and for amendment of the remittitur in the above cause having been heretofore made upon the part of the respondent herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

APPENDIX G

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

MARY C. HALL, Acting Director
Division of Insurance
Department of Economic Development
State of Missouri,

Plaintiff,

v.

TRANSIT CASUALTY COMPANY
130 South Bemiston, Suite 101
St. Louis, Missouri 63105,

Defendant.

Cause No. CV185-1206CC
DivisionII

AMENDED ORDER OF LIQUIDATION AND APPOINTMENT OF PERMANENT RECEIVER

Now on this 3rd day of December, 1985 the Petition for Liquidation filed by Mary C. Hall, Acting Director of the Division of Insurance, Department of Economic Development, State of Missouri, coming on for hearing and the defendant company by its president and member of the board of directors, Gerald Steven DeGennaro having entered a general appearance in behalf of defendant corporation, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Transit Casualty Company is hereby declared to be insolvent;

2. Mary C. Hall, Acting Director of the Division of Insurance, Department of Economic Development, State of Missouri, is appointed permanent receiver with all powers and duties attendant thereof until further order of the Court;

3. John C. Cozad is hereby appointed Special Deputy Receiver;

4. The receiver is ordered to take posession of, with authority to transfer and control, the property, business books, records, and accounts of the company, and possession and control of the premises occupied by defendant for the transaction of its business;

5. The officers, directors, agents, employees of defendant Transit Casualty Company are and continue to be permanently enjoined and restrained from selling, assigning or disposing of the business or of any of the assets of said Transit Casualty Company;

6. All of the creditors and claimants of defendant Transit Casualty Company, wherever situated, be and are hereby restrained and enjoined from levying any execution, garnishment or attachment on the property and assets of said Transit Casualty Company;

7. All persons, wherever situated are permanently enjoined and restrained from prosecuting or bringing any action, issuing any process or obtaining any judgment against defendant Transit Casualty Company or its properties or assets;

8. All persons, wherever situated, are hereby enjoined from interference with the possession, title or rights of petitioner as Receiver in Liquidation in and to the assets of defendant Transit Casualty Company and from interference with the conduct of liqudation

of defendant Transit Casualty Company except as may be ordered by the Court;

9. All policies of insurance issued by defendant Transit Casualty Company cancelled effective at midnight on December 20, 1985;

10. The receiver is authorized to hire, retain, terminate employees as needed to effectuate the winding up and liquidation of the defendant company and to negotiate the terms of such employment relations;

11. The receiver is authorized to contract with independent contractors, including but not limited to attorneys, to perform services as needed to effectuate the winding up and liquidation of the defendant company;

12. The receiver is authorized to transfer, invest, re-invest and otherwise deal in the assets and property, real or personal, of the company so as to effectuate the winding up and liquidation of the defendant company;

13. The receiver is authorized to file suit, make claims, arbitrate, settle or take other legal action in pursuit of the interests of the receivership;

14. The receiver is authorized to do all things necessary to effectuate the winding up and liquidation of the defendant company;

15. All costs of this proceeding shall be taxed against defendant Transit Casualty Company.

BYRON L. KINDLER, Judge
Circuit Court of Cole County, MO
Division II

FILED
AUG 27 1992
OFFICE OF THE CLERK

92-185

No.

In The

Supreme Court of the United States

October Term, 1991

THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS ANCILLARY RECEIVER OF TRANSIT CASUALTY COMPANY,

Petitioner,

vs.

ALAN DIGIROL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals Of The State Of New York

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	*ii*
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR DENYING THE WRIT	3
I. PETITIONER FAILED TO TIMELY AND PROPERLY RAISE THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION AS AN OBSTACLE PREVENTING THE NEW YORK STATE COURT OF APPEALS FROM DECIDING THAT NOTICE WAS REQUIRED TO EFFECTIVELY CANCEL RESPONDENT'S POLICY WITH THE TRANSIT CASUALTY COMPANY	3
II. THE JUDGMENT OF A SISTER STATE SHOULD NOT BE GIVEN FULL FAITH AND CREDIT IF THE EFFECT WOULD BE TO DEPRIVE A PERSON OF HIS RIGHTS WITHOUT DUE PROCESS OF LAW	5
III. THERE IS NO MANIFEST NECESSITY FOR THE UNITED STATES SUPREME COURT TO TAKE JURISDICTION IN THIS CASE	6
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Cases:	
Brock v Roadway Express, Inc., 481 US 252 (1987)	6
Carr v Union Mutual Fire Ins. Co., 28 Mo. App. 215 (1887)	4, 5
Mtr. of Consolidated Mut. Ins. Co., 77 NY2d 144	2
Mtr. of Empire State Surety Co., 214 NY 553, 108 NE 825	4
Old Wayne Mutual Life Association of Indianapolis, Indiana v McDonough, 204 US 8 (1907)	5
People v Commercial Alliance Life Ins. Co., 154 NY 95, 30 NE 114	4
Statutes:	
United States Constitution (Article 4, Section 1)	1, 3

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

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---

STATEMENT OF THE CASE

Petitioner's statement of the case, emphasizes and interjects, for the first time, the argument that the New York Court of Appeals was bound under the United States Constitution (Article 4, Section 1) to give Full Faith and Credit to the Missouri Order liquidating the Transit Casualty ("Transit") and simultaneously cancelling its contracts, including the contract issued to the Respondent (Digirol) in New York State prior to Digirol's fire loss.

Nowhere in Petitioner's Brief on Appeal to the New York Courts, including the Court of Appeals, was the Full Faith and Credit clause of the United States Constitution ever mentioned,

let alone urged by the Receiver of Transit Casualty Company as a basis for sustaining cancellation of Digirol's policy without notice.

Until the "Transit" Receiver moved, subsequent to the decision and Order of the New York State Court of Appeals, for rehearing and reargument or in the alternative to amend that Court's Remittitur, the Ancillary Receiver's present reference to Full Faith and Credit was almost hidden from view in its appellate brief. The Ancillary Receiver failed to highlight such a reference either as an issue in the case or as a point heading.

Basically the Ancillary Receiver argued before the New York State Courts that the process of liquidating insurance companies, who fell into financial trouble, had to be swift in order to protect the company's assets for the benefit of then existing creditors; and that this overriding concern for those creditors justified cancellation of fire policies without notice to policy holders.

Additionally the Petitioner's statement of the case is incorrect to the extent it states that the Respondent Digirol, in making his claim for compensation for his loss under the New York State Property/Casualty Insurance Security Fund, relied exclusively on constitutional due process protection for his contractual property right to notice of cancellation. Although this argument was strenuously urged, Digirol cited precedent without constitutional underpinnings as well as the then recently decided New York State Court of Appeals case of *Mtr. of Consolidated Mut. Ins. Co.*, 77 NY2d 144, to the effect that a contractual right to health care benefits which mature and become vested at time of employee's retirement cannot be terminated by the judicial liquidation of the corporate employer. In *Mtr. of Consolidated Mut. Ins. Co., supra*, the New York State Court of Appeals decided the issue without reference to constitutional due process protection.

SUMMARY OF THE ARGUMENT

Petitioner contends that the Full Faith and Credit clause of the United States Constitution (Article IV, Section 1) required the Courts of New York State, where the insurance contract was issued, to respect the Missouri Judicial Order liquidating the Transit Casualty Company which it contends provided for cancellation of insurance contracts without notice to policy holders.

The Petitioner further contends that it was not guilty of failing to raise this argument in a timely fashion before the New York State Court of Appeals because Petitioner assumed that if the issue was decided against it, on due process grounds, then its present argument for Full Faith and Credit would have been of no avail.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO TIMELY AND PROPERLY RAISE THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION AS AN OBSTACLE PREVENTING THE NEW YORK STATE COURT OF APPEALS FROM DECIDING THAT NOTICE WAS REQUIRED TO EFFECTIVELY CANCEL RESPONDENT'S POLICY WITH THE TRANSIT CASUALTY COMPANY.

Petitioner's excuse for failing to urge the constitutional mandate of the Full Faith and Credit clause is unjustified. The Petitioner contends, in failing to do so, that the Court of Appeals' reliance on New York contract and statutory principles as the basis for the Court's decision was a complete surprise and unexpected in view of Digirol's emphasis on federal procedural due process principles requiring notice to policy holders as a precondition to effective policy cancellation. In other words, the Ancillary Receiver argues that New York precedent provided for can-

cellation of an insurance policy without notice upon the filing of a judicial order liquidating the insurance company, and such precedent could only have been overruled by a finding that the policy holder was entitled to the procedural due process requirement of notice. In the latter event, the Ancillary Receiver contends that the argument for Constitutional Full Faith and Credit would not have been appropriate in the face of a due process violation.

In so arguing the Respondent Digirol contends that there was no clear precedent in New York State governing the issue of notice in spite of those cases cited by the "Transit" Receiver (*Mtr. of Empire State Surety Co.*, 214 NY 553, 108 NE 825 and *People v Commercial Alliance Life Ins. Co.*, 154 NY 95, 30 NE 114) for the proposition that insurance obligations were terminated upon filing the liquidation order or such other time as determined by the Court issuing the order. As the New York State Court of Appeals points out in its majority decision, there were a number of obligations of the insurance company that continue into the future following the date of policy cancellation. Petitioner's appendix 5a. Respondent further contends that the issue of notice was far from settled in New York State. There was no New York case like the Missouri case of *Carr v. Union Mutual Fire Ins. Co.*, 28 Mo. App. 215 (1887) ostensibly holding that notice of cancellation was not required to effectively cancel a fire insurance policy. The Receiver was unjustified in treating the issue as settled law to the extent of treating the application of Full Faith and Credit so cavalierly in its Briefs in support of its argument before the New York Courts. Based upon New York State precedent there is ample reason to believe that the New York State Court of Appeals could eschew Digirol's constitutional argument and decide the case in favor of him based upon New York State common law principles alone.

It is unfair for the Petitioner at this late date to urge that the New York State Court of Appeals violated the Constitutional requirement of Full Faith and Credit in holding contrary to the 100 year old Missouri judicial precedent of *Carr v. Union Mut. Fire Ins. Co., supra*. The New York State Court of Appeals never mentioned Full Faith and Credit in its decision and was justified in this regard. The Receiver's tacit or hint of reliance on the Full Faith and Credit clause by the Received failed to give the New York State Court of Appeals the notice that is necessary to raise the issue before that Court.

Raising the issue now significantly adds a totally new dimension to the arguments addressed before the New York State Court of Appeals and therefore the Full Faith and Credit argument should now be rejected.

II. THE JUDGMENT OF A SISTER STATE SHOULD NOT BE GIVEN FULL FAITH AND CREDIT IF THE EFFECT WOULD BE TO DEPRIVE A PERSON OF HIS RIGHTS WITHOUT DUE PROCESS OF LAW.

Where a judicial order or judgment has been secured without jurisdiction over the persons whose rights are about to be affected, there is no constitutional requirement for Full Faith and Credit. *Old Wayne Mutual Life Association of Indianapolis, Indiana v McDonough*, 204 US 8 (1907)

Although the New York Court of Appeals did not decide the issue, it is clear from the record in this case that the Respondent Digirol was denied due process of law before the New York State Court of Appeals intervened to correct the manifest injustice that occurred when the Missouri Order liquidating the Transit Casu-

alty Company purported to take away his property right to notice cancelling his fire policy. *cf. Brock v Roadway Express, Inc.*, 481 US 252 (1987)

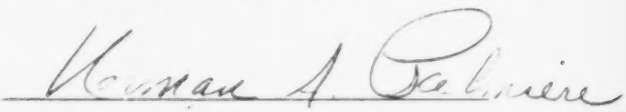
III. THERE IS NO MANIFEST NECESSITY FOR THE UNITED STATES SUPREME COURT TO TAKE JURISDICTION IN THIS CASE.

The unique facts of this case are such that it is unlikely that this type of conflict will ever reoccur. The failure of the Respondent Digirol to receive cancellation notice was a most unusual event and will unlikely reoccur in the future. As the Petition points out, the "Transit" Receiver did attempt to notify Digirol but mistakenly sent the notification to the wrong address. It is this unusual circumstance that has now generated the vast amount of legal argument that has previously been made before the Courts of New York State and which the Petitioner now requests to make again before the Supreme Court of the United States. There simply is no valid reason or precedent that requires the Supreme Court to take jurisdiction in a case involving the narrow and unprecedented factual issue involved in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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No. 92-185

IN THE
Supreme Court of the United States
October Term, 1991

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Petitioner,

v.

ALAN DIGIROL,

Respondent.

On Petition For A Writ Of
Certiorari To The Court of
Appeals Of The State Of New York

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TABLE OF CONTENTS

Pages

Table of Authorities ii

Argument

1. The New York Court's Violation of the Full Faith and Credit Clause Was Timely Raised And Is Properly Before This Court 1

2. Claimant Has No Protected Property "Right" in the Notice Provisions of A Policy That Was Terminated By Operation of Law 5

3. The Order Sought To Be Reviewed Has Far-Ranging and Deleterious Implications and Should Not Be Permitted to Stand 9

Conclusion 10

TABLE OF AUTHORITIES

Cases *Pages*

Bishop v. Wood, 426 U.S. 341 (1976).....6

Board of Regents v. Roth, 408 U.S. 564 (1972).....6

Boston Env. Sanitation Inspectors Assn. v. Boston, 794 F.2d 12 (1st Cir. 1986).....6

Carr v. Union Mut. Fire Ins. Co., 28 Mo. App. 215 (1887).....7

Fiore v. Oakwood Plaza Shopping Center, Inc., 78 N.Y.2d 572, 585 N.E.2d 364, 578 N.Y.S.2d 115 (1991).....4

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932).....3

Lac D'Amiante du Quebec, Ltee. v. American Home Assur. Co., 864 F.2d 1033 (3d Cir. 1988).....9

Martyne v. American Union Fire Insurance Co., 216 N.Y. 183, 110 N.E. 502 (1915).....7

Matter of Consolidated Mut. Ins. Co. (*Levy*), 77 N.Y.2d 144, 566 N.E.2d 633, 565 N.Y.S.2d 434 (1990).....4,5

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Matter of Equitable Reserve Fund Life Assoc. of the City of N.Y., 131 N.Y. 354, 30 N.E. 114 (1892).....2

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Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949).....7,8

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People v. Commercial Alliance Life Ins. Co., 154 N.Y. 95, 47 N.E. 968 (1897).....2

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).....2

Thomas v. Land, 225 Mo. App. 216, 30 S.W.2d 1035 (1930).....7

Walentas v. Lipper, 862 F.2d 414 (2d Cir. 1988), *cert. den.* 490 U.S. 1021 (1989).....6

OTHER AUTHORITIES

N.Y. Insurance Law §7405(b).....4
§7410(b).....3
§7426.....5

IN THE
Supreme Court of the United States
October Term, 1991

THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS ANCILLARY RECEIVER OF TRANSIT CASUALTY COMPANY,

Petitioner,

v.

ALAN DIGIROL,

Respondent.

On Petition For A Writ Of
Certiorari To The Court of
Appeals Of The State Of New York

PETITIONER'S REPLY BRIEF

ARGUMENT

1. The New York Court's Violation of the Full Faith and Credit Clause Was Timely Raised And Is Properly Before This Court.

Respondent contends that the issue of compliance with the Full Faith and Credit mandate was never raised to the State Courts (Brief in Opp. 1). Respondent immediately thereafter contradicts that position by asserting to this Court that the full faith and credit argument "was almost hidden from view" and was not "highlight[ed]" in the Superintendent's briefs to those Courts (*Id.* at 2). Respondent has thus in effect admitted that the preclusive effect of the Full Faith and Credit Clause was indeed properly preserved by the Superintendent for this Court's review. One need not grace a constitutional argument with neon lights in order to preserve the issue for consideration by this Court.

Moreover, the Superintendent's advocacy of this issue below was in no way "almost hidden from view", as Respondent suggests. In fact, the record clearly shows that the Superintendent vigorously asserted at every stage of the litigation the need to give full faith and credit to the Missouri Order which liquidated Transit and simultaneously cancelled its contracts. *See* Pet. 6-11. The issue was timely asserted before the State Courts with more than adequate precision, and thus was preserved for this Court's review. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980).

Claimant concedes that, even had the issue of compliance with the Full Faith and Credit mandate been raised *for the very first time* on the motion for reconsideration before the Court of Appeals, such argument would have been timely if, as Petitioner contends, the Court of Appeals' decision, which refused to accord full faith and credit to the Missouri Order solely upon purported *contract* principles without reaching Respondent's due process argument, was a "new and unexpected" development (Brief in Opp. 3-5). Claimant argues, however, that the determination was not unexpected, asserting conclusorily that "there was no clear precedent in New York State governing the issue of notice in spite of those cases cited by the 'Transit' Receiver" (Brief in Opp. 4).

This argument is utterly without merit. The Order sought to be reviewed marks an abrupt departure from well-established New York precedent that an Order of Liquidation effects absolute cancellation of insurance policies with or without notice to the insured. *See, e.g., Matter of Empire State Surety Co.*, 214 N.Y. 553, 568-569, 108 N.E. 825 (1915); *People v. Commercial Alliance Life Ins. Co.*, 154 N.Y. 95, 47 N.E. 968 (1897); *Matter of Equitable Reserve Fund Life Assoc. of the City of N. Y.*, 131 N.Y. 354, 378-379, 30 N.E. 114 (1892). The same rule is in effect in Missouri, which issued the Order of Liquidation cancelling Transit's policies, and in virtually all other states. *See* Pet. 22-26. Indeed, it is the reliance by the Court of Appeals upon Mr. Digirol's purported *contractual* rights as the basis for overturning firmly-established law in New York which was "new and unexpected". That alone fully justified the raising of the

Full Faith and Credit Clause on the motion for rehearing and reargument. *See, Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 367 (1932). Thus, even if the Superintendent had not preserved the Full Faith and Credit Clause argument in the Courts below (which was certainly not the case), the violation of that Clause was properly preserved for this Court's consideration.

Inasmuch as the Court of Appeals purported to ignore the due process argument raised by Respondent and determined the case solely upon "contract" principles, the doctrine of Full Faith and Credit is fully applicable. It is settled law that the Full Faith and Credit Clause precludes any inquiry into the substantive merits of a Judgment of a sister state where the Court rendering the Judgment had jurisdiction. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).[1]

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1. As the basis for avoiding the Full Faith and Credit Clause, Mr. Digirol argued to the New York Court of Appeals that the Missouri Court lacked jurisdiction over him. This argument was not reached in the Court of Appeals' decision. In any event, it is clear that Respondent confused the critical issue.

Respondent has not, and cannot, dispute that the Missouri Court properly had jurisdiction over Transit Casualty Company and therefore had the right to place the company in liquidation and to cancel its policies. The Uniform Insurers Liquidation Act expressly provides, with respect to the "conduct of delinquency proceedings against insurers not domiciled in this state," N.Y. Insurance Law §7410(b):

> "The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all books and records of the insurer located in this state, and shall have the immediate right to recover balances due from the local agents and obtain possession of any books and records of the insurer found in this state."

It is thus the domiciliary Liquidation Court, having the absolute right of control over the "contracts . . . located in this state," which

(Footnote continued on the next page)

Clearly, by purporting to look to principles of *New York contract law* in holding, in effect, that the Missouri Court erred in issuing the Order liquidating Transit and cancelling Transit's policies without providing for notice to Mr. Digirol in accordance with the terms of his policy, the Court of Appeals overstepped its bounds. The doctrine of Full Faith and Credit requires that New York give conclusive effect to the express terms of the Missouri Order liquidating Transit. *Milliken v. Meyer, supra; Fiore v. Oakwood Plaza Shopping Center, Inc.*, 78 N.Y.2d 572, 577, 585 N.E.2d 364, 578 N.Y.S.2d 115 (1991).[2]

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has the right to terminate those contracts, just as New York has the right to terminate the contracts of its domiciled insurers upon liquidation. N.Y. Insurance Law §7405(b).

Mr. Digirol cannot claim that he had any "right" to notice of the petition seeking Transit's liquidation, as he concededly had no right to participate in, object to or intervene in that liquidation proceeding. *At most,* Mr. Digirol may argue that he had a purported entitlement to notice of the cancellation of his insurance policy based upon a purported "property right" in that policy. However, Respondent's right to such notice would necessarily depend on whether Respondent actually has a "property interest" in the cancelled policy, or in obtaining a replacement policy, sufficient to require that notice of cancellation be provided. As discussed *infra,* no such "property right" exists.

2. Respondent refers to *Matter of Consolidated Mut. Ins. Co. (Levy),* 77 N.Y.2d 144, 566 N.E.2d 633, 565 N.Y.S.2d 434 (1990), claiming that there the Court of Appeals held, without reference to due process issues, that certain contractual obligations of a liquidated insurer may continue into the future. As discussed *supra,* however, the New York Court of Appeals is prohibited by the Full Faith and Credit Clause from attacking on substantive grounds the Judgment of its sister state, Missouri, where the Missouri Court had jurisdiction to render that Order. *Consolidated Mutual,* with its reliance upon *contract* principles under New York law, is therefore irrelevant.

Moreover, and as noted by the dissenting opinion at the New York Court of Appeals in the instant action, *Consolidated Mutual* involved the obligation to continue retirement benefits provided to the

(Footnote continued on the next page)

2.Claimant Has No Protected Property "Right" in the Notice Provisions of A Policy That Was Terminated By Operation of Law.

Respondent argues that the Missouri Court's Order of Liquidation which cancelled all policies of insurance issued by Transit Casualty Company effective midnight, December 20, 1985 should not be given full faith and credit by the Courts of New York, since it purportedly deprived Digirol of his so-called "property right" to notice of cancellation of his policy without due process of law (Brief in Opp. 5-6).

The Superintendent refrained in his petition from extensive discussion of the merits of Respondent's due process argument, since the New York Court of Appeals purported not to have reached any constitutional issue in rendering the Order sought to be reviewed. It is submitted that Respondent's claim of denial of due process is, in any event, without foundation in law. It is clear that no "property interest" to which due process could attach is involved here, since no such interest could exist with respect to the continuation of the provisions of a policy upon the death of the company which issued that policy.

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insurer's employees and turned on the application of settled legal principles developed under the ERISA vesting scheme. Appendix to Pet., p. 11a, N. 1. What is more, for policy reasons, New York provides a preference to employees of an insolvent insurer in the liquidation proceeding. *See,* N.Y. Insurance Law §7426. Thus, *Consolidated Mutual* involved important policy considerations not extant in the instant case. As the dissent at the Court of Appeals stated:

> "The narrow holding of that case [*Consolidated Mutual*], in an area of law with unique policy concerns, should not be used to justify the unsettling of settled law in another heavily regulated area with its own distinct policy considerations. *Consolidated Mutual* provides no support for the recognition, in a liquidation proceeding, of the executory promise to give notice." Appendix to Pet., p. 11a, N. 1.

In order to prevail upon his claim of deprivation of property without due process of law, Mr. Digirol must first establish the existence of a valid "property" interest within the meaning of the Fourteenth Amendment. *See, Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972). As this Court has recognized, "the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth, supra*, 408 U.S. 564, 572. This Court has repeatedly emphasized that property interests recognized by the Constitution for purposes of procedural due process protection are not created by the Constitution, but must be firmly rooted in an independent source such as state law. *See, e.g., Bishop v. Wood, supra*, 426 U.S. 341; *Paul v. Davis, supra*, 424 U.S. 693; *Board of Regents v. Roth, supra*, 408 U.S. 564.

Here, the "property interest" claimant appears to assert is his so-called "vested right" to pre-cancellation notice, purportedly arising from both a notification provision in the cancelled policy requiring 45 days' notice of cancellation and from statutory provisions. Plainly, no such "property interest" exists. As will be demonstrated, *infra*, state law recognizes no property "right" in the provisions of a policy that has been terminated by operation of law.

Clearly, the mere breach of a contractual right does not amount to a deprivation of property without due process. *See, e.g., McCormick v. Oklahoma City*, 236 U.S. 657 (1915); *Walentas v. Lipper*, 862 F.2d 414 (2d Cir. 1988), *cert. den.* 490 U.S. 1021 (1989); *Boston Env. Sanitation Inspectors Assn. v. Boston*, 794 F.2d 12 (1st Cir. 1986). Even where breach of a contractual right has occurred, there is no deprivation of property within the meaning of the Fourteenth Amendment where claimant has no interest recognized and protected by state law. *Id.* Thus, the issue of whether Mr. Digirol possesses a purported "property right" in the provisions of his cancelled policy must be determined by a consideration of whether state law recognizes and secures such a right.

Unequivocally, Missouri does not recognize any property right in continued application of the provisions of an insurance policy terminated by judicial decree. On the contrary, the law of Missouri is manifest: implicit in any contract entered into with a corporation is the knowledge that the legal effect of an Order of Liquidation is to abruptly fix the rights of all claimants and terminate all policies and executory contracts of the bankrupt corporation. *See, e.g., Carr v. Union Mut. Fire Ins. Co.*, 28 Mo. App. 215 (1887). Indeed, until the Order sought to be appealed from, this was the law in New York as well. *Martyne v. American Union Fire Insurance Co.*, 216 N.Y. 183, 193, 110 N.E. 502 (1915); *People v. American Loan & Trust Co.*, 172 N.Y. 371, 65 N.E. 200 (1902). The well-settled law of Missouri, in any event, is that no claim may be accepted which arose after the cancellation of all policies of a liquidated insurer in accordance with the Order of Liquidation, with or without notice to the insured and regardless of any contractual provision requiring notice. *See, e.g., Thomas v. Land*, 225 Mo. App. 216, 30 S.W.2d 1035 (1930); *Carr v. Union Mut. Fire Ins. Co., supra,* 28 Mo. App. 215.

Nor is there any basis in the statute law of Missouri for Claimant's purported "property right". No statutory requirement exists there that actual notice be provided of the Court-ordered cancellation of the policies of an insolvent insurer.

Thus, while Mr. Digirol had a protected property right (worthy of actual notice) with respect to any claims arising *prior* to liquidation (and, in this case, unearned premiums), he had no constitutionally protected "property right" in the "notice" provisions of a policy of a liquidated company.

This Court has clearly indicated that the degree of notice required by due process is determined by the property interest that is affected. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949). Because, as a matter of Missouri law, no property interest existed with respect to the policy's contractual provisions or future performance under the policy, the constructive notice provided by the filing of the Order of Liquidation, and certainly the publication of that Order by the Receiver in the New York Law Journal and other publications, sufficed

to satisfy any minimal "notice" requirement which might be deemed applicable.

The Receiver's further efforts to give notice are also significant. Although the Missouri Court's Order cancelling Transit's policies contained no provision requiring the giving of any notice to policyholders, the Receiver undertook to notify *each* of Transit's approximately 100,000 insureds by mail between the time the Amended Order of Liquidation issued on December 4, 1985 and the final date for termination of all policies, December 20, 1985. Notification of cancellation was mailed to Mr. Digirol on or about December 13, 1985, to the address listed on the declarations page of the policy,[3] but solely due to post office error, was returned undelivered by the post office.

The undisputed mailing by the Receiver to Mr. Digirol on December 13, 1985, constitutes notice. "Actual notice" does not require "actual receipt" of the notice. Even where property rights are in jeopardy and actual notice is required by an applicable statutory or contractual provision, all that need be shown is that notice was properly sent; proof of actual receipt is *not* required. Thus, in *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. 306, this Court, while holding that persons subject to the loss of a property interest must be given actual notice (e.g., by mail) if their names and addresses are known, noted that on some occasions actual notice by mail would not reach its intended recipient, and stated that non-receipt would not make such notice ineffective. 339 U.S. at 319-320.

We submit that any conceivable constitutional due process requirement as to notice was fully satisfied by the Receiver here. Respondent's assertion, that he was purportedly deprived of a "property right" without due process of law, is without foundation.

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3. Although an amendment in the body of the policy designated a new mailing address, Mr. Digirol testified before the Referee that he regularly received mail sent to the address specified on the declarations page. Mr. Digirol never contested that the address on the declarations page of the policy was a proper address of the insured.

3. The Order Sought To Be Reviewed Has Far-Ranging and Deleterious Implications and Should Not Be Permitted to Stand.

Respondent attempts to minimize the effect of the Court of Appeals' Order, suggesting that it is applicable only to the most unusual circumstance in which a claimant failed to receive a misaddressed cancellation notice. In fact, the Court of Appeals' determination has far-reaching, and most unfortunate, implications. That Order would mandate that the receiver of a foreign insurer provide notice of cancellation in accordance with the terms of each policy issued to New York residents by the defunct insurer, notwithstanding an absolute order of cancellation issued by a sister state. That this would place an undue burden upon liquidators of insurance companies, already facing tremendous difficulties and responsibilities upon the issuance of an Order of Liquidation, *see, e.g., Lac D'Amiante du Quebec, Ltee. v. American Home Assur. Co.*, 864 F.2d 1033 (3d Cir. 1988), cannot seriously be questioned.

Further, a necessary corollary of the decision is that the executory contract obligations of the insurer are deemed "vested" at the time of entry of the Liquidation Order and survive notwithstanding the Liquidation Order. If that be the case, that would indeed signal a profound change in the law, with disturbing consequences. For example, policies which are non-cancellable by their terms (such as certain bonds, life insurance policies and health insurance policies) could *never* be cancelled, notwithstanding liquidation of the company. The far-reaching impact of the Court of Appeals' decision would thus undermine not only the Missouri Court's Order of Liquidation, but the entire liquidation process of a sister state.

The uncertainty which would be injected into the liquidation process, if each state could determine for itself, as a matter of its contract law, which provisions in a policy were terminated by the liquidation of a foreign insurer and which could not be terminated, is incalculable. The decision of the New York Court of Appeals not only lacks any basis in law but adds intolerable uncertainty to liquidation proceedings involving multi-state insurers. That Order should not be permitted to stand.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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